92-640

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

COLORADO TAX PAYERS UNION, INC., et al.

Petitioners,

v.

ROY ROMER, individually, and as Governor of the State of Colorado, et al.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Dated: September 14, 1992

QUESTIONS PRESENTED

1. Whether voter and state initiative proponents have standing to sue in federal court when their federal rights are violated by the actions of Governor Roy Romer acting in his official capacity as a state official?

2. Whether the District Court correctly held that the Colorado Libertarian Party has standing to sue as it derives organizational standing from both its status as a representative of its members, and on its own behalf for its own injuries?

3. Whether the individual initiative petitioners and the Colorado Taxpayers Union suing on behalf of its members have standing as taxpayers?

4. Whether the District Court incorrectly held that the petitioners' deprivation of First Amendment Rights is "de minimus"?

PARTIES

The caption of the case contains the names of all parties.

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I. OPINIONS BELOW

The decision of the United States Court of Appeals, Tenth Circuit (App. p. 1a), is reported at 963 F.2d 1394 (1992). The decision of the United States District Court for Colorado is reported at 750 F. Supp. 1041 (D. Colo. 1990). It also appears in the Appendix to the Petition for a Writ of Certiorari, p. 42a.

II. JURISDICTION

The decision of the United States Court of Appeals was rendered and judgment entered on May 15, 1992. No petition for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of Article 3, Section 1, First and Fourteenth Amendments to the United States Constitution, as well as Colorado Revised Statutes §§ 1-45-116 and 1-45-117, are set

forth in the Appendix to the Petition for a Writ of Certiorari, p. 93a.

IV. STATEMENT OF THE CASE

This case involves the most basic of all constitutional rights--the right of initiative petition proponents to federal court standing. They seek to sue Governor Roy Romer, individually and in his official capacity as Governor of Colorado, for injunctive relief, declaratory judgment for violation of their First and Fourteenth Amendment rights. The petitioners established standing to sue in federal court by demonstrating that their federal rights were jeopardized by the actions of Governor Roy Romer, a state official. The District Court correctly held that the Colorado Libertarian Party has standing to sue as it derives organizational standing from both its status as a representative of its members and on its own behalf for its own

injuries. The individual petitioners and the Colorado Taxpayers Union suing on behalf of its members have standing as voters and initiative proponents.

The petitioners commenced this action before the District Court alleging that Governor Roy Romer unlawfully expended public monies and resources to campaign against Amendment 6, a citizen tax initiative. The Petitioners maintained, and Respondent does not deny, that the Governor used in-kind resources of his office, including staff time, equipment, and materials, in addition to use of the state airplane and cars both for the purpose of conducting his own campaign against Amendment 6, and to support the efforts of an independent citizens group known as Citizens for Representative Government.

On the Respondent's motion for summary judgment, the District Court

denied that part of Respondent's motion which alleged the petitioners lacked standing, but granted the remainder Summary Judgment motion, finding, inter alia, that this is not a public expenditure case. Petitioners appeal the decision and order which granted Respondent's motion on the grounds that this is not a public expenditure case. The issue the Petitioners presented for the Tenth Circuit Court of Appeals was that this is a voters' rights case, and the District Court erred in its factual finding that no staff time or significant public resources were used by respondent in his anti-Amendment 6 campaign. Although the District Court properly recognized that "public funds collected from taxation may not be used to support opposition to an initiated measure," it erred by carving a so-called "de minimis" exception to this rule, and finding that a

violation of the constitutional rule may be cured by reimbursement. App. p. 51a. The Tenth Circuit held that petitioners did not have standing, and it did not decide the issue of summary judgment. The Supreme Court of the United States granted a thirty-day extension of time to file Petition for Writ of Certiorari.

V. STATEMENT OF FACTS

Petitioners Mary Lind, David Aitkin, Vern Bickel, Pasquale Francomano, Clyde Harkins, Basil R. Walton, Jr., Janet Gustafson, and Gene Levy are residents, registered voters, circulators, financiers, volunteers and petitioner signers in the State of Colorado. See generally App. p. 46a; App. p. 62a.

Respondents asserted that the Governor spent minimal time and minimal resources on his anti-Amendment 6 campaign. The full record in this case, however, reveals that the time spent by

the Governor, and most notably his staff, was substantial. The Governor worked with the citizen group known as Citizens for Representative Government (CRG) and in essence ran their campaign out of the Executive Office.

Staff time, in addition to the use of manpower paid for by petitioners', by necessity involved the use of office and state resources such as telephones, stamps, paper, automobiles and airplanes. The state resources used by the Governor diluted the effectiveness of the resources of the proponents' grass-roots movement. In the end, petitioners found themselves pitted against the unlimited resources of the Governor's office in an unevenly weighted game of catch-up. The value of each state resource used by the Governor thus resulted in a corresponding injury to petitioners. Whether the value of certain

items such as the airplanes was reimbursed is irrelevant.

The injury to Petitioners occurred when the Governor availed himself of state resources in fighting the Amendment. Petitioners clearly had no access to such resources. Partial reimbursement many months later, after the constitutional injury occurred, is the legal equivalent of shutting the barn door after the horse has escaped. See App. p. 51a.

The Governor's statements to the press show that he devoted substantial time, and consequently used substantial time of his staff, and substantial state resources in his anti-Amendment 6 campaign. In an October 24, 1988, News Release, Governor Romer stated: "I am conducting an all-out blitz to defeat this amendment. . . . I must devote a substantial portion of my time to this effort during the next two weeks . . ."

App. p. 85a. The Governor made use of state staff, airplane, automobiles, and security personnel in coordinating the anti-Amendment 6 campaign. App. p. 57a.

VI. REASONS FOR ALLOWANCE OF THE WRIT

The Court should review the decision of the court below because it continues confusion among the various decisions of the court of appeals on the readjustment voter, political party, taxpayer, and organization standing. The decision encourages continued imprecision by the courts.

A. Voters and state initiative proponents have standing to sue in federal court when their federal rights are violated by the actions of Governor Roy Romer acting in his official capacity as a state official.

1. Article III requirements.

The United States Supreme Court has synthesized the Article III Standing requirements to mean that the party who

seeks to invoke the power of a federal rule on the constitutionality of a state official acting in his official capacity must make a three-part showing: (1) the plaintiff must show that he personally suffered some actual or threatened injury, economic or otherwise, as the result of the putatively illegal conduct of the governmental defendant; (2) he must show that the injury fairly can be traced to the challenged action of that defendant; and (3) he must show that the injury is likely to be redressed by a favorable decision. Valley Forge, etc. v. Americans United, etc., 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984). Article III limits federal juridical power to "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

Flast v. Cohen, 392 U.S. 83, 97 (1968). The separation of powers concept, in short, is at the heart of the law of Article III.

Supplementing the Article III standing requirements are various discretionary and prudential considerations. The considerations include the following: (1) the plaintiff normally must assert his own legal rights, not those of third parties; (2) even if Article III requirements are met, the court usually refrains from adjudicating questions of wide public significance that mount to "generalized grievances"; and (3) the plaintiffs complaint must fall within the "zone of interests" protected or regulated by the statutory or constitutional provision in question. Valley Forge, etc., supra, 474-75.

In this writ, the standing problem is again brought into focus. The

Tenth Circuit Court of Appeals has added voter and initiative proponents to the list of variables and difficult criteria for standing.

2. The District Court found that the Petitioners were voters and initiative proponents.

The District Court found that the petitioners have standing. App. p. ?, citing Allen v. Wright, 468 U.S. 737, 751 (1984). The District Court applied Allen to the petitioners. Id. In Allen, the United States Supreme Court held that the plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief (citing Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 (1978)).

In this case, the District Court found that petitioners, as the plaintiffs

in Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 (1978), suffered or will incur some injury in fact that is both distrinct and palpable. Id. The court states: "The harm consists of the additional burden imposed on the plaintiffs by the defendants' allegedly unconstitutional acts." Id. The district court found that "the issues are not moot because the same plaintiffs are proponents of another initiative, Amendment 1 on the 1990 general election ballot." Id. The district court found that "the defendants have produced nothing to contest the allegations that the plaintiff organizations, including the Colorado Libertarian part, represent people supporting Amendment 6 in 1988 and Amendment 1 in 1990. Id. The District Court concluded: "Accordingly, both the individual and organizational plaintiffs

have standing to challenge the defendants' action in the 1988 election." Id. Finally the court concludes, "This is not a public expenditure case." Id.

3. Registered voters and initiative proponents have standing.

a. Registered voters.

The voting is a fundamental right, Reynolds v. Simms, 377 U.S. 533 (1964). Registered voters have standing to sue on their own behalf to enforce this fundamental right. Allen v. Wright, 468 U.S. 373, 751 (1984); Anderson v. Celebrezze, 460 U.S. 780, 786-88 (1983); Bollock v. Carter, 405 U.S. 134, 143-44 (1972); Bacher v. Democratic Nat. Party, 836 F.2d 837 (4th Cir. 1987).

There is no dispute that Petitioners Mary Lind, David Aitkin, Pasquale Francomano, Clyde Harkins, Basil R. Walton, Jr., Janet Gustafson, and Gene

Levy are registered voters and signers of the petitions. App. p. 62a. The Petitioners have standing because they are voters and their fundamental right to vote was abridged when the Governor used the power and resources of his office to campaign with Citizens for a Representative Government against the petitioners' Amendment 6. App. p. 72a.

b. **Initiative proponents.**

The right to petition with the initiative process is a First Amendment Right. Meyer v. Grant, 486 U.S. 414 (1988). In striking down a Colorado statute that had prohibited the use of paid petition circulators in initiative campaigns the United States Supreme Court has held, the right to initiate laws implicates the First Amendment "at its zenith." Id. at 425.

The initiative proponents are not just voters or taxpayers. They

are circulators, signers, financiers, advocates, and volunteers of the initiative petitions that were harmed by the Governor's actions. App. p. 62a. They have a direct and intimate investment in the initiative itself. They have a personal stake in the outcome of the petitions beyond gathering signatures. Governor Romer's unauthorized use of state resources was more than an effort to garner public opinion. See Affidavits, App. pp. 75a. His official actions were to make unauthorized uses of state resources to limit or stop the proponents from the exercise of their First Amendment Right to petition their government. The harm to the proponents is illustrated by the affidavit of Steven Federowicz:

> The Governor's letter, implying the power of his office, intimidated me. It was sent as a matter of "utmost urgency' and seemed to suggest that I must act out of fear of the . . .Governor's power. The

> message I got was if I didn't act, I was going to suffer. I was being forced to influence my PTA members to oppose an amendment.

App. p. 76a. Conrad and Isabel Krieger, in their affidavit note:

> . . .[D]uring the last two weeks or so before the election or at that juncture when Governor Romer became actively involved against the amendment, making statements that the amendment would drastically cut property taxes and jeopardize public education along with police and fire protection, etc., we decided to change our decision and vote against the amendment. Our decision to change our votes was directly the result of Governor Romer's concern, and the tremendous effort he seemed to put in to fighting the amendment.
>
> We changed our votes because we believed the Governor would tell us the truth on such things, and we were therefore concerned that our son-in-law, an employee of Jefferson County Schools, might lose his job.

> We looked and listened to hear what the Amendment #6 people were saying about the Governor's statements, but did not really hear or learn anything about their position.

App. p. 79a. Terry Considine, the current candidate for the United States Senate from Colorado, notes:

> In 1988 I served as a Colorado State Senator.
>
> I was interested in the Amendment #6 campaign. I spoke to public officials regarding my observations, and also elicited their comments. I generally followed the campaign in the media and elsewhere.
>
> It was my observation that public opinion surrounding Amendment #6 was set by Governor Romer. The public opinion which he set was extremely one sided and adverse to the petition.
>
> From a political perspective, the Governor's fervent involvement in the campaign to defeat the amendment was material. The Governor's high popularity, strong leadership style and the fear of possible official reprisal created tremendous

political pressure on both public officials and others to join the opposition campaign.

I observed that the Governor was the visible leader of the opposition campaign. I observed that joining his campaign and urging its rejection was popularized as the political thing to do. The opposition took on a frenzied air. For example, to the best of my recollection the Denver Post printed numerous opposing editorials. The frenzy predicted absolutely dire consequences if the measure passed.

During the Governor's campaign, without regard to the merits of the measure, I observed a condition--an environment that tended to chill me and would have chilled any politically sensitive individual, from publicly opposing the Governor's position.

It was my observation that the Governor's high profile campaign greatly contributed to the loud chorus of criticism against Amendment #6. This loud chorus, following his lead, made it extremely difficult for the proponents of the amendment to rebut

> adequately the onslaught of criticism, which in my estimation was significantly overstated.
>
> I believe, based upon my knowledge of the facts of the measure, and my observation of the political events at the time, the Governor's campaign limited the voting public's opportunity to judge fairly the measure's merits. It is also my opinion that the Governor's campaign had the effect of controlling the public debate of the measure, directing the public mind against the measure.

App. p. 81a. In fact, the proponent petitioners speech and petition rights are diminished. They have no chance to match the Governor's use of his office and power. Thus, their right of access to the petition process is significantly diminished.

4. Petitioners have standing by demonstrating that their federal rights are in jeopardy.

The Tenth Circuit Court of Appeals simply ignores the federal rights issue. Citing no cases, the court below said "in this case we have an especially compelling federalism concern that dictates careful attention to the threshold case or controversy requirement of standing." App. p. 38a. The court justifies this rule by stating: "The mere allegation of federal constitutional violations cannot be allowed to clothe a state governmental decisionmaking process with the ill-fitting garments of federal court scrutiny." App. p. 39a.

But many years ago the United States Supreme Court in Baker v. Carr reversed this federal course. 369 U.S. 186 (1962). In Baker, the challenge was to the apportionment of the Tennessee Assembly. It had not been reapportioned in 60 years, despite a state constitutional requirement that

representation be based on the basis of population, and despite significant changes in population over the years. The Court reasoned that not all cases involving "politics" present non-justiciable "political questions." 369 U.S. at 210-211. The Court listed a catalogue of factors to present a true political question.[1] The Court determined whether a party has standing to sue by ascertaining whether it has "alleged such a personal state in the outcome of the controversy as to assure that concrete adverseness which shapes presentation of [the] issues. . . ." KVUE, Inc., and

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[1] The factors are: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department. (2) a "lack of judicially discoverable and manageable standards for resolving" the issue; (3) the "impossibility of deciding [the issue] without an initial policy determination of a kind clearly for non-judicial discretion"; (4) the "impossibility of a court's undertaking independent resolution without expressing lack of respect due co-ordinate branches of government"; (5) an "unusual need for unquestioning adherence to a political decision already made"; and (6) the potential for "embarrassment from multifarious pronouncements by various departments on one question."

Austin Broadcasting Corp. v. Moore, 709 F.2d 922 (5th Cir. 1983), (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). The similarity of the Baker plaintiffs and the petitioners is that both seek standing to sue in federal court by demonstrating that their federal rights are jeopardized by the action of the state.

For standing, the petitioners must merely demonstrate a realistic danger of sustaining a direct injury as a result of the state's action. Valley Forge, etc. v. Americans United, etc., 454 U.S. 464, 472 (1982). Applying this standard to the facts of this case, the District Court factually found that the Petitioners Mary Lind, David Aitkin, Pasquale Francomano, Clyde Harking, and Basil R. Walton, Jr., Janet Gustafson, and Gene Levy, in their individual capacities as voters, had sufficiently alleged an injury traceable to Governor Romer which would be redressed

if his actions were held to violate the First and Fourteenth Amendments of the United States Constitution. App. p. 44a. "This challenge to governmental action as an unconstitutional interference with the First Amendment right of support of a citizen initiative presents 'a claim of present objective harm or a threat of specific future harm.'" App. p. 45a, citing Meese v. Keane, 481 U.S. 465, 472 (1987) (quoting Laird v. Tatum, 408 U.S. 1 (1972)); see also Common Cause v. Bolger, 512 F. Supp. 26, 30 (D.D.C. 1980.)

In fact, this position was endorsed by the Tenth Circuit. Campbell v. Arapahoe Cty. Sch. Dist. #6, 90 F.R.D. 189, 192 (D. Colo. 1981), aff'd, 704 F.2d 501 (10th Cir. 1983). In Campbell, the court held that voter-taxpayers had standing to challenge the actions of a school board in opposing an amendment to the state constitution. App. p. 45a,

citing Campbell 90 F.R.D. 189, 192. Thus, the petitioners establish standing to sue in federal court by demonstrating that their federal rights are jeopardized by the actions of Governor Roy Romer acting in his official capacity as a state official.

B. The District Court correctly held that the Colorado Libertarian Party has standing to sue as it derives organizational standing from both its status as a representative of its members, and on its own behalf for its own injuries.

1. Petitioners have organizational standing.

a. Summary of Argument.

The District Court correctly held that "[t]he plaintiffs have alleged sufficient injury for standing." App. p. 44a. The Court of Appeals nonetheless contends that the Colorado Taxpayers Union, the individual

petitioners, and the Colorado Libertarian Party fail to satisfy the criteria for litigants' standing. The Colorado Libertarian Party has standing to sue on its own behalf under Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). The individual petitioners, and the Colorado Taxpayers Union suing on their behalf, have standing under Allen v. Wright, 468 U.S. 737 (1984), because their injuries are "fairly traceable" to the unlawful acts complained of. This Court should affirm the District Court's finding that all of the petitioners herein have standing to challenge the Governor's use of state assets and in-kind resources in furtherance of his vigorous anti-Amendment 6 campaign.

2. The Colorado Libertarian Party has standing to sue on its own behalf.

The District Court correctly held that the Colorado Libertarian Party

has standing to sue. The Libertarian Party derives organizational standing from both its status as a representative of its members, and on its own behalf for its own injuries.

a. **The Libertarian Party has standing to sue under Allen and Havens.**

A membership association may have standing to sue in its own right if it seeks judicial relief for injuries to the organization. Warth v. Seldin, 422 U.S. 490, 511 (1975). The relevant test of the Libertarian Party's standing to sue was established by the Supreme Court in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). In Havens, the Court held that when an organization sues on its own behalf, the relevant inquiry is whether it has alleged "a personal stake in the outcome of the controversy." Id. at 378-79. The plaintiff organization in Havens,

Housing Opportunities Made Equal (HOME), alleged that the defendant's racial steering practices frustrated HOME's efforts to promote equal access to housing through counseling and other referral services. HOME claimed that it was forced to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices. This response to the defendant's illegal action resulted in a drain on the organization's resources. Id. at 369.

HOME was granted standing to sue on its own behalf. The Court reasoned that if the defendant's practices impaired HOME's ability to provide counseling and referral services then:

> there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's

> resources--constitutes far more than simply a setback to the organization's abstract social interests.

Id. at 379 (citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972)). Moreover, the Court in Havens noted that the fact "[t]hat the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered . . . and accordingly does not deprive the organization of standing." Id. at 379, n.20 (citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 263 (1977)). See also Spann v. Colonial Village, Inc., 899 F.2d 24, 29 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 508 (1990) (housing organizations dedicated to fair housing had standing to sue when they challenged real estate advertisements which they alleged were racially discriminatory because they

alleged "concrete drains on their time and resources . . . sufficiently tangible to satisfy Article III's injury-in-fact requirement").

Romer used his staff and the resources of his office to defeat the tax initiative supported by the Libertarian Party, forcing the Libertarian Party to bear a greater burden in its attempt to pass Amendment 6. In competition with the Governor's unlimited and ready access to state resources, the organization's limited resources were strained and diluted. This drain on the resources of the Libertarian Party constitutes a judicially cognizable injury under Havens, and the party therefore has standing to sue on its own behalf.

Even where the organization itself has not been injured, a membership organization may have standing to sue on behalf of its members if three conditions

are met: (i) its members would otherwise have standing to sue in their own right; (ii) the interests the association seeks to protect are "germane to the organization's purpose"; and (iii) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

The Colorado Libertarian Party is a qualified political organization under Colorado Law. Colo. Rev. Stat. § 1-1-104(17) defines a political organization as "any group of registered electors who, by petition for nomination of an independent candidate as provided in § 1-4-801, places upon the official general election ballot nominees for public office." App. p. 46a. However, nowhere does the statute limit the scope of such an organization's

purposes so as to preclude it from playing an active role in promoting a citizen initiative. In fact, the Libertarian Party's support of citizen initiatives like Amendment 6 is germane to its purpose of limiting government. See District Court Memorandum and Opinion, App. at 47a.

Moreover, among the Libertarian Party's membership are supporters, qualified signatories, and circulators of Amendment 6. See District Court Memorandum and Opinion, App. at 46a. There is no contesting the fact that the Libertarian Party represents people who supported Amendment 6 both in 1988 and the subsequent initiative in 1990--individuals who have standing to litigate this action. Id. Moreover, even if those individuals had not joined in this action, the Libertarian Party could still have asserted its claims against respondent without inclusion in the action of the

individually named plaintiffs. Accordingly, the Libertarian party has standing to pursue the claims stemming from the Governor's exploitation of public resources in his campaign to defeat Amendment 6.

b. **The Libertarian Party is not precluded from standing by virtue of its status as a political party.**

The Court of Appeals erroneously held that the Libertarian Party cannot use the expenditure of additional funds to counteract the Governor's activities as a distinct and concrete injury. App. p. 11a. This argument is clearly negated by the unequivocal holding of the Court in Havens that an organization may allege a monetary injury incurred as a result of its pursuit of a noneconomic political or ideological goal when such injury is occasioned by the

unlawful acts of another. See also supra discussion of Havens.

The Court of Appeals asserts that the Libertarian Party cannot claim an injury because the Governor's acts in no way prevented the amendment from being placed on the ballot. App. p. 13a. This belies the reality of the modern American political scene. In what is essentially a two-party system, minor parties such as the Libertarian Party often do not run candidates in general elections, but instead exist to garner support for their ideologies among major party candidates and the public. The political mandate of the Libertarian Party is the limitation of government, including its taxing powers. Hence, the Libertarian Party had a real and vital interest in the passage of an initiative codifying Libertarian views on taxation.

The Libertarian Party, as well as the individual petitioners and CTU, as the contributors to the Amendment 6 campaign and as active participants in the campaign, suffered injury regardless of the outcome of the election. Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980). "The purpose of political campaigns is often as much to educate the public concerning certain issues as it is to elect a candidate," and the injury results not from the outcome of the election "but rather [when] the political process is tainted and rendered unfair." Id. at 31.

A blitz campaign waged by the chief state executive and fueled by unlimited access to states resources can be the death-knell of minor party voices, effectively foreclosing one of the few viable avenues of a minor party--the initiative. Competition with major

parties and other minor parties is fair and to be expected. In this case, however, the initiative avenue of a minor party was trampled by an incumbent government. It is not difficult to see the corresponding threat to liberty engendered by such action.

c. The Libertarian Party's First Amendment rights were chilled.

The Tenth Circuit suggests that neither the Libertarian Party nor its members demonstrated that their First Amendment rights were chilled. However, it is well established that a party has standing to challenge a governmental action which deters or has a "chilling effect" upon the party's exercise of First Amendment rights. Socialist Workers Party v. Attorney General of U.S., 419 U.S. 1314 (1974); Laird v. Tatum, 408 U.S. 1 (1972); see also Baird v. State Bar of Arizona,

401 U.S. 1 (1971); Shelton v. Tucker, 364 U.S. 479 (1960). The governmental action need not be "regulatory, proscriptive, or compulsory in nature," Socialist Workers Party, 419 U.S. at 1318; nor must it constitute a complete prohibition against the exercise of First Amendment rights. Laird v. Tatum, 408 U.S. at 11. Rather, the party must have an objectively reasonable basis for claiming that, because of the government's action, it has suffered or it will suffer real harm as a result of exercising First Amendment rights. Laird v. Tatum, 408 U.S. at 12-13. This can be achieved by claiming either a "specific present objective harm or a threat of specific future harm." Id. at 14. "Whether the claimed 'chill' is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold

jurisdictional question." Socialist Workers Party, 419 U.S. at 1319.

In this case, the impermissible use of government resources by respondent has caused the Colorado Libertarian Party and individual petitioners specific present objective harm, chilling their exercise of First Amendment petition rights. Here, since the harm is present and identifiable, the case for standing is even greater than it was in Socialist Workers Party, where the harm was threatened in the future. The impermissible expenditures by the Romer administration in combatting Amendment 6 had the effect of imposing a tax upon the Libertarian Party in its effort to exercise its First Amendment right to petition. As indicated above, the respondent's action diluted and drained the resources of the Party. This constituted a direct and real harm which

had a chilling effect on the Party's exercise of its rights.[2]

C. **The individual initiative petitioners and the Colorado Taxpayers Union suing on behalf of its members have standing as taxpayers.**

1. **Organizational Standing.**

As a threshold matter, standing for an organization such as Colorado Taxpayers Union

> depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Warth v. Seldin, 422 U.S. 490, 515 (1975). Accord Common Cause v. Bolger, 512 F.

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[2] Whether the Governor's participation and use of state resources was the deciding factor is irrelevant to petitioners' injuries. See supra discussion of political goals of minor parties, and the Common Cause case.

Supp. 26 (D.D.C. 1980), aff'd after remand, 461 U.S. 911 (1983).

In the case at bar, petitioners seek a declaration that the Governor's use of state resources was unconstitutional. This remedy, if granted, will inure to the benefit of the members of the Colorado Taxpayers Union who will continue to be proponents of future citizen tax initiatives. A declaration that the Governor, who has announced his intent to fight all such future initiatives, may not use state resources to do so will relieve petitioners of the burden of campaigning against the unlimited resources of the Governor's office.

2. The standard is under Allen v. Wright.

In Allen v. Wright, 468 U.S. 737 (1984), the Supreme Court held that "[t]he requirement of standing . . . has a core component derived directly from the

Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Id. at 751. See also Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38 (1976) (the injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision). Accord Valley Forge etc. v. Americans United etc., 454 U.S. 464 (1982); Duke Power Co. v. Carolina Environ. Study Group, 438 U.S. 55 (1978); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

The injury sustained by the petitioners in the instant action was precisely the type of injury contemplated by the Supreme Court in Allen v. Wright. As the District Court in the case at bar correctly recognized:

> The claimed injury is traceable to the defendant's activities. Allen v. Wright, 468 U.S. at 751; see also Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 262 (1977). The harm consists of the additional burden imposed on the [petitioners] by the [respondent's] allegedly unconstitutional acts. Like the plaintiffs in Common Cause v. Bolger, the [petitioners] here have alleged that their campaign for Amendment 6 would not have been so difficult (and, in fact, might have been successful) but for [respondent's] acts.

App. p. 46a.

3. **Initiative proponent and taxpayer standing.**

The Tenth Circuit's contentions that the Colorado Taxpayers Union has failed to satisfy the two-prong test to determine taxpayer standing, as articulated by the Supreme Court in Flast v. Cohen, 392 U.S. 83 (1968), are without merit.

In Flast v. Cohen, supra, the Court held that a taxpayer may challenge the constitutionality of a federal taxing

or spending program if there is a logical nexus between the status of the taxpayer and the claim. The Flast Court set forth the two-pronged test requiring, first, a nexus between the plaintiff's status as a taxpayer and the government action challenged, and second, a nexus between the taxpayer injury and the constitutional claim. Id. at 102-3.

This Court has recognized that proponents of citizens' initiatives, like Amendment 6, have standing as proponent taxpayers to challenge the actions of those who unlawfully use state resources to influence voter opposition to an initiative. In Campbell v. Arapahoe Cty. School Dist. #6, 90 F.R.D. 189 (D. Colo. 1981), aff'd, 704 F.2d 501 (10th Cir. 1983), a case factually close the case at bar, this Court found that proponents of an initiating petition, by which the Colorado Constitution would be amended so

as to require voter approval of all proposed state and local tax increases, had standing to bring an action for declaratory judgment that school districts and the city acted unlawfully using state resources to influence voter opposition to the proposed amendment. This Court concluded in Campbell: ". . . where the expenditures result in a reduction of the plaintiffs' effectiveness in their attempt to persuade the people of Colorado to exercise their sovereign power. This is not a case in which the taxpayers claim only a financial impact from payments out of the public treasury. Id. at 191-92 (emphasis added).

Like the plaintiffs in Campbell, not only have petitioners asserted an injury-in-fact resulting from the suppression of their pro-Amendment 6 endeavors, but, as taxpayers, petitioners have an "immediate and direct interest" in

thwarting the Governor's use of state resources in contravention of their First Amendment right to petition. Accordingly, petitioners have satisfied both prongs of the Flast test.

In Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980), a citizens' group whose members planned to run as candidates for federal elective office challenged the constitutionality of a congressional franking statute. The group claimed that the statute was unconstitutional on its face and violated the First and Fifth Amendment rights of its members by subsidizing the election campaigns of incumbent congressmen, but not of challengers. The Court found that the individual members of the organization would have had the standing to sue in their own right, and thus the organization "standing in their shoes" derived standing from their status. The court found

standing on several grounds, including, inter alia, the injuries suffered by the individual members (i) as contributors and campaign participants, since the effectiveness of their contributions and campaign work would be substantially undercut by the funding subsidy to each incumbent; (ii) as registered voters upon whose political rights the franking statute placed a substantial burden; and (iii) as taxpayers.

Here, as in Common Cause, the petitioners, as a direct result of the Governor's use of state resources, had to spend more to keep up with his campaign. Indeed, as the District Court found, the effect of such monies as they had was undoubtedly diluted, and but for the Governor's use of state resources, the campaign of CTU and the individual petitioners would not have been so difficult. App. p. 46a.

The Tenth Circuit ignores the fact that CTU and the individual petitioners have standing as voters.[3] The Governor's misappropriation of public resources to support his anti-Amendment 6 campaign unquestionably diluted the ultimate effectiveness of CTU and its members in their endeavors because they were forced to compete with an adversary who, unlike their own grass-roots movement, had unlimited access to the resources available to the highest executive of the State of Colorado.

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[3] It is important to note that neither Flast nor Common Cause in any way involves injury sustained by proponents of a petition. As the Supreme Court stated in Warth v. Seldin, 422 U.S. 490 (1975):

> [Standing] often turns on the nature of and source of the claim asserted. . . . Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.

Id. at 500.

Accordingly, the holdings of Frothingham v. Miller, 262 U.S. 474 (1923) and Doremus v. Board of Education, 342 U.S. 429 (1952) do not apply as they apply to taxpayer standing, not voter standing.

The fact is that the supporters of the tax initiative were voters and signers of the petition. App. p. 62a. In Campbell v. Arapahoe Cty. School Dist. #6, 90 F.R.D. 189 (D. Colo. 1981), aff'd, 704 F.2d 501 (10th Cir. 1983), the voter-taxpayer had standing to challenge the actions of a school board in opposing an amendment to the state constitution. App. p. 47a. The same plaintiffs are the proponents in the present case. Id.

D. The District Court erred in holding that the petitioners' deprivation of First Amendment Rights is "de minimus."

1. Petitioners have shown a violation of constitutional rights.

a. The Governor's free speech is not at issue.

The District Court places great emphasis on the Governor's right to speak on public issues. App. p. 54a. Petitioners do not seek to curtail the Governor's freedom of speech, and the Court of Appeals did not choose to address the issue. App. pp. 6a and 39a. The District Court's arguments in this regard merely beg the issue and serve no purpose other than to divert this Court's attention away from the fundamental issue in this case which is not the Governor's free speech, but rather the petitioners' First Amendment right to petition the government, without the dilution of their efforts through the Governor's expenditure of state resources provided by the petitioners' tax dollars.

Determination of the case at bar is not advanced by hyperbole

concerning the Governor's duty and First Amendment right to speak out on public issues. App. p. 57a. The petitioners are not so foolish as to challenge these truisms. They will waste the Court's time in attempting to do so. The District Court's assertions of a difference between the conduct of a public official to speak out are irrelevant to the Governor's expenditure of state funds. App. p. 56a. Rather, this case of first impression should be determined by a careful and rational analysis of analogous cases in which the courts have spoken to the unconstitutionality of forcing individuals to fund views anathema to their beliefs. Thomas Jefferson stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, James Madison: The Nationalist, at 354 (1948) (quoted in Abood v. Detroit

Bd. of Educ., 431 U.S. 209, 235, n.31 (1977)).

b. **The right to petition is unique.**

The right to petition is set forth separately, distinctly and expressly in the First Amendment. Meyer v. Grant, 486 U.S. 414 (1988). It derives not from an amorphous penumbra of the right to free speech, but directly and expressly from the language of the First Amendment. The District Court does not and cannot deny that the purpose of the right to petition is to enable the people to bypass elected officials and address the government directly. That right serves as a safety valve against the entrenchment of a political class and of special interests. It is for this reason that the right to initiate laws continues to be recognized as implicating the First

Amendment "at its zenith." Meyer v. Grant, 486 U.S. 414 (1988).

The Colorado Constitution expressly reserves to the people the rights of initiative and referendum. Colo. Const., art. V, §§ 1.(2) and (3). See In re Second Initiative Const. Amendment, 200 Colo. 141, 613 P.2d 867, 869 (Colo. 1980). As a reserved right, Article V may not be impaired or disparaged by other rights enumerated under the Colorado Constitution. Colo. Const., art. II, § 28. Indeed, the Colorado Constitution expressly limits the powers of the Governor with respect to initiatives: "[t]he veto power of the governor shall not extend to measures initiated or referred to the people." Colo. Const., art. V, § 1.4. That provision does not expressly reserve to the governor any other powers with regard

to initiatives, such as the right to campaign and spend state resources.

Although the Colorado Constitution enumerates certain rights and duties of the governor (Colo. Const., art. IV, § 1) the right to act in an official capacity with regard to the initiatives is nowhere provided in the Colorado Constitution. In contrast, where the governor has specific rights, such as the veto, they are expressly enumerated. See Colo. Const., art IV, §§ 1 and 9.

Consistent with this constitutional scheme, Colorado common law and statutory law provides no role for the governor in the initiative process, although it expressly and specifically dictates the roles to be played by electors, the legislative counsel, and the secretary of state. See Colo. Rev. Stat. § 1-40-101, et seq. (1990); City of Rocky Ford v. Brown, 133 Colo. 262, 293 P.2d

974, 975 (1956). Moreover, the Colorado legislature may not amend the Colorado Constitution to provide such an express role of the Governor to use state resources to defeat an initiative, because such an amendment would act to limit the right of the people to initiate proposed laws. It is well-established that the Colorado legislature may not impose such limiting restrictions on the people's right to initiate laws. Colorado Project-Common Cause v. Anderson, 177 Colo. 402, 495 P.2d 218, 219 (1972); Baker v. Bosworth, 122 Colo. 356, 222 P.2d 416 (1959); Burks v. City of Lafayette, 142 Colo. 61, 349 P.2d 692 (1960).

The fact that past governors of Colorado have been actively involved in creating the right to petition, as the respondent argues, is of no consequence here. Clearly, it is the role of governors to shape the

constitutional and legislative functions of their state. Having taken part in the creation of the initiative right for the people, however, does not then entitle future governors to violate the federal and state constitutions by actively inserting themselves into the initiative process while using state resources to fuel their campaign.

2. The Governor's use of state resources to defeat a citizen initiative was unlawful.

There is no dispositive case law supporting the Governor's right to use state resources to campaign against a citizen initiative.

The Supreme Court has not spoken to the unique factual situation in the case at bar, involving executive use of state resources to defeat a citizen initiative. However, the petitioners position is that as the Governor uses the

state's resources and his official power to interfere in the political process, he violates their First Amendment Rights. The principle that public funds may not be used to support opposition to an initiative is recognized in Mountain States Legal Foundation v. Denver School Dist., 459 F. Supp. 357, 360-61 (D. Colo. 1978). Here the court states "publically financed opposition to the exercise of that [initiative] right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado." Cited at App. p. 50a; 459 F. Supp. at 360-61.

The District Court mistakenly suggests that these expenditures were incidental and that the Governor's interference with the initiative process was a mere enlargement "of the political personage which are not separable from the

man in office." App. p. 58a. However, the use of his staff (App. p. 91a) and his personal involvement was not inconsequential. The impact on the initiative process was characterized by the Governor himself as an "all-out blitz to defeat" the initiative amendment. App. p. 85a. His travel violated state policies. App. p. 87a. His use of state resources and power was "intimidating" (App. p. 76a), impacted on the state debate of the issue (App. p. 79a), and was material to the Amendment's defeat (App. p. 82a).

3. Reimbursement does not cure the constitutional defect.

The District Court on the one hand seems to suggest that the Governor reimbursed the State for the value of all significant resources used, and on the other hand argues that it was his right to use such resources, regardless of

reimbursement. The Court states "these expenditures. . .enhance and extend the reach of the political person." App. p. 57a. Clearly, the Governor's partial reimbursement of some major expenses is an admission by the Governor of the inappropriateness of his use of state resources in the anti-Amendment 6 campaign.

Reimbursement, however, whether total or partial, merely begs the issue in this case. The Supreme Court made it clear in Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435 (1984), that reimbursement will not cure a constitutional defect. In Ellis, a labor union collected dues from its members and refunded part of the dues through a rebate program, which reimbursed to protesting employees the pro rata share of their dues used for non-collective bargaining purposes. The Court in Ellis found the

pure rebate program constitutionally inadequate. "A rebate scheme reduces but does not eliminate the statutory violation." Ellis, 466 U.S. at 444.

Moreover, the State of Colorado is not a lending institution. It is a violation of the Colorado Constitution to pledge the credit of the State, and the Governor acted ultra vires of his powers by effectively lending state resources to CRG for the Governor's and CRG's joint anti-Amendment 6 campaign. Colo. Const. art. XI, § 1.

The District Court argues that the expenditures or the value of the resources used are "de minimis." App. p. 51a. The size of the Governor's expenditures relative to the total budget is completely irrelevant. In essence, the District Court seems to suggest that the Governor may violate the Constitution so long as he violates it only a little. In

Ellis, however, the Supreme Court noted: "The amount at issue is undeniably minute. But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Ellis, 466 U.S. 442 (citing Powell v. McCormack, 395 U.S. 486 (1969)).

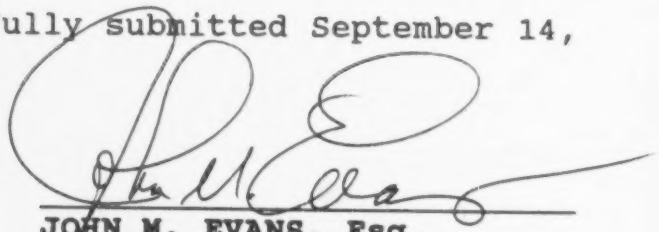
The District Court's bootstrap argument creates a legal and practical fiction. "When those personal powers are not linked to the levers of the coercive authority of the government he heads, there is no governmental interference with the First Amendment rights. . ." App. p. 57a. Using substantial state resources and diluting the efforts of his grass-roots opponents to defeat the initiative's proponents is the interference. The absence or presence of coersion does not cure the constitutional violation committed here.

E. CONCLUSION

The courts unquestionably need direction on when and how to apply standing to right to petition voter rights cases. This case involves the most basic of all constitutional rights--the right of citizens as registered voters and proponents of an initiative have standing to sue the Governor Roy Romer, individually and in his official capacity as Governor of Colorado for injunctive relief, declaratory judgment for violation of their First and Fourteenth Amendment rights. The petitioners establish standing to sue in federal court by demonstrating that their federal rights are jeopardized by the actions of Governor Roy Romer, a state official. The District Court correctly held that the Colorado Libertarian Party has standing to sue as it derives organizational standing from both its status as a representative of its members, and on its own behalf for its own

injuries. The individual petitioners and the Colorado Taxpayers Union suing on behalf of its members have standing as taxpayers. The Court should grant certiorari in order to resolve an important question of Federal Constitutional law which remains uncertain as a result of the decisions of the courts of appeals.

Respectfully submitted September 14, 1992.



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APPENDIX 1

United States Court of Appeals

Tenth Circuit

COLORADO TAXPAYERS UNION, INC.; COLORADO LIBERTARIAN PARTY; MARY LIND; DAVID AITKIN; VERN BICKEL PASQUALE FRANCOMANO; CLYDE HARKINS; BASIL R. WALTON, JR.,

Plaintiffs-Appellants/Cross-Appellees,

and

JANET GUSTAFSON; GENE LEVY,

Plaintiffs,

v.

ROY ROMER, individually, and as Governor of the State of Colorado,

Defendant-Appellee/Cross-Appellant,

and

CITIZENS FOR REPRESENTATIVE GOVERNMENT; PHIL FOX; CLARK SHAW; DOES 1 THROUGH 20,

Defendants.

Nos. 91-1005 & 91-1019

(Cross Appeals)

Argued March 11, 1992

Decided May 15, 1992

Appeal from the United States District Court for the District of Colorado (D.C. No. 88-M-1818).

Carla T. Main (Brian M. Cogan, of Stroock & Stroock & Lavan, New York, New York; Wayne E. Stockton, Fort Collins, Colorado; and Michael McDonald, Center for Individual Rights, Washington, D.C., Of Counsel, with her on the briefs), of Stroock & Stroock & Lavan, New York, New York, for the Plaintiffs-Appellants/Cross-Appellees.

Maurice Knaizer (Gale A. Norton, Attorney General; Raymond T. Slaughter, Chief Deputy Attorney General; and Timothy M. Tymkovich, Solicitor General, on the briefs), Office of the Attorney General, for the Defendant-Appellee/Cross-Appellant.

Roxanne Campbell, Aurora, Colorado; Alden Kautz, Littleton, Colorado; William Johnson, Littleton, Colorado; Roy Peister,

Littleton, Colorado; Donald Turner, Littleton, Colorado, pro se amici.

Before **ANDERSON** and **TACHA**, Circuit Judges, and **COOK**, District Judge. (The Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.)

TACHA, Circuit Judge.

Appellants appeal an order of the district court granting defendants' motion for summary judgment. Colorado Taxpayers Union, Inc. v. Romer, 750 F. Supp. 1041 (D. Colo. 1990). On appeal, appellants contend that the Governor of Colorado violated their First Amendment rights by using state resources to defeat an amendment on the ballot at a Colorado general election. Appellee Romer cross appeals asserting that appellants lack standing to pursue this action. We

exercise jurisdiction under 28 U.S.C. § 1291 and dismiss the appeal for lack of standing.

BACKGROUND

In October of 1988, the citizens of Colorado placed an initiative, commonly referred to as Amendment six, on the ballot at the Colorado general election. Amendment six focused on statewide tax reform and would have allowed the citizens of Colorado to vote directly on any significant change in state tax laws.

Appellee Romer, the Governor of the State of Colorado, and defendant Citizens for Representative Government, of which defendants Phil Fox and Clark Shaw were members, publicly opposed the amendment. Appellants assert that Governor Romer used numerous public resources to publicly oppose the amendment. These resources allegedly included staff time, equipment and supplies, travel resources, and

facilities at the state mansion and state capital (sic) office. Amendment six eventually was defeated in the Colorado general election.

After defeat of the amendment, appellants filed a suit in the United States District Court for the District of Colorado seeking relief under 42 U.S.C. § 1983. Appellants claimed that Governor Romer violated their First Amendment rights by using state resources and the power and prestige of his office to oppose the amendment. Appellants also asserted that the Governor and the other defendants combined in a conspiracy to violate the appellants' constitutional rights in violation of 42 U.S.C. § 1985(3) and common law.

Asserting that appellants lacked standing and that they failed to state a claim for relief for a violation of the United States Constitution, defendants

moved for summary judgment. Appellants cross-moved for summary judgment. The district court denied appellants' motion and then addressed defendants' motion, denying it in part and granting it in part. The district court found that appellants had standing to sue, but that Governor Romer's expenditures were "de minimis" so that the appellants failed to state a claim.

DISCUSSION

On appeal, Romer contends that appellants lack standing to pursue this action. Because we agree with this contention, we address only the standing argument and do not address the merits of appellants' contentions on appeal. In this case, appellants are two associations, the Colorado Taxpayers Union and the Colorado Libertarian Party, and a number of individuals.

Before a party may invoke the jurisdiction of the federal courts, Article III requires that the party demonstrate that (1) "'he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'"; (2) "the injury 'fairly can be traced to the challenged action'"; and (3) the injury "'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26,, 38, 41 (1976)). If a party satisfies these minimum constitutional requirements, then a court may still deny standing for prudential reasons if the injury alleged constitutes a "generalized grievance" that more

appropriately should be addressed by the representative branches. See Allen v. Wright, 468 U.S. 737, 751 (1984).

The district court concluded that plaintiffs "alleged sufficient injury for standing." Colorado Taxpayers Union, Inc. v. Romer, 750 F. Supp. 1041, 1043 (D. Colo. 1990). In support of this conclusion, the district court stated that "[t]he harm consists of the additional burden imposed on the plaintiffs by the defendants' allegedly unconstitutional acts. Like the plaintiffs in Common Cause v. Bolger, [512 F. Supp. 26, 30 (D.D.C. 1980)], the plaintiffs here have alleged that their campaign for Amendment 6 would not have been so difficult (and, in fact, might have been successful) but for the defendants' acts." Id. We must now determine whether the individuals or either of the associations, the Colorado Libertarian Party or the Colorado

Taxpayers Union, have standing to bring this suit.

A. **The Colorado Libertarian Party**

Appellants contend that the Libertarian Party has standing to sue because it seeks judicial relief for injuries to the organization. An organization had standing on its own behalf if it meets the standing requirements that apply to individuals. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982). To have standing, plaintiffs must allege "'such a personal stake in the outcome of the controversy' as to warrant . . . invocation of federal-court jurisdiction." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Appellants must demonstrate that their alleged injury is an "injury in fact, economic or otherwise." Association of

Data Processing Serv. Orgs., Inc., v. Camp, 397 U.S. 150, 152 (1969). The injury must be "'distinct and palpable,'" Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)), and "real and immediate," not abstract, conjectural, speculative, or hypothetical, City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

Appellants claim that Governor Romer used his staff and the resources of his office to defeat the tax initiative supported by the Libertarian Party and thus forced the Party to bear a greater burden in its attempt to pass the amendment. Appellants claim that under Havens, 455 U.S. at 379, this drain on resources is a concrete and demonstrable injury.

In Havens, the Supreme Court found that an organization was entitled to

standing on its own behalf because the organization alleged that an apartment owner's racial steering practices had perceptively impaired the organization's ability to provide counseling and referral services for low and moderate income home seekers. The Court stated that "[s]uch [a] concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's resources--constitutes far more than simply a setback to the organization's abstract social interests." Id. at 379.

Appellants's argument that they were forced to counteract the Governor's activities through the expenditure of additional funds is purely conjectural. Such an argument simply does not demonstrate that the Libertarian Party or its members have suffered a distinct and concrete injury. At most, the Libertarian Party's allegations suggest only that the

organization has received a minor setback to its organizational purpose. The Libertarian Party's argument would require this court to engage in a futile act of speculation in order to determine the extent of some remote, uncertain injury. This type of conjectural injury cannot establish standing under Havens. In Havens, the defendant's allegedly unlawful conduct could be tied directly to a concrete harm inflicted upon the primary activity of the plaintiff organization--the organizations' counseling and referral efforts were rendered futile when the defendant turned away referred applicants. Here, appellants' actions in spending additional funds simply cannot be traced to the Governor's allegedly illegal expenditures. It is pure conjecture to assume that Governor Romer's activities caused appellants to drain their resources. Thus, we conclude that

appellants have not "allege[d] [a] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984).

The Libertarian Party also argues that it suffered an injury when its First Amendment rights were chilled. Appellants contend that the allegedly illegal expenditures by the Governor effectively imposed a tax upon the Libertarian Party in its effort to exercise its First Amendment right to petition. Essentially, appellants claim that the dilution of Party resources chilled the exercise of First Amendment rights.

We cannot agree with the characterization of the Governor's activities as a "tax" on the Libertarian Party or its members' First Amendment right to petition. The Governor's

activities in no way prevented the Libertarian Party or its members from petitioning the government. The Governor's activities only commenced once the amendment was placed on the ballot. The Governor's allegedly unlawful activities never prevented members of the Libertarian Party from associating, speaking on behalf of the amendment, or voting on the amendment. Further, the Libertarian Party and its members failed to demonstrate that Romer's activities impacted their ability to petition the government of Colorado in the future. Thus, neither the Libertarian Party nor its members has demonstrated that First Amendment rights were chilled.

The Libertarian Party contends that even if it has not been injured, it is entitled to standing on behalf of its members. In Hunt v. Washington State Apple Advertising Commission, 432 U.S.

333, 343 (1977), the Supreme Court announced a three-part test for associational standing:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.

Because we conclude that the Libertarian Party's members do not have standing to sue in their own right, the Party is not entitled to an associational standing.

B. **The Colorado Taxpayers Union and the Individual Appellants**

The individual appellants claim that they are entitled to standing as taxpayers. The Colorado Taxpayers Union asserts standing as an organization suing on behalf of its tax-paying members. Appellants argue that the Governor illegally used state tax funds in order to

defeat Amendment six and that this misappropriation entitles them to standing under Flast v. Cohen, 392 U.S. 83 (1968). The district court stated that "[t]he essence of the plaintiffs' position is that when the Governor becomes an advocate against a citizen initiative, he has exceeded the limits of his official power and interfered in the process by which the people exercise their sovereign right to change the authority of the officials who govern them." Colorado Taxpayers Union, Inc., 750 F. Supp. at 1044. Appellee Romer argues that this claim is insufficient to give appellants taxpayer standing under Flast.

Most of the taxpayer standing cases addressed by the Supreme Court deal with federal taxpayer standing. The general prohibition against federal taxpayer standing originated in Frothingham v. Mellon, 262 U.S. 447 (1923). In

Frothingham, the Supreme Court held that a federal taxpayer lacks standing to sue to enjoin federal officials from enforcing a federal statute authorizing appropriations of public money. The federal taxpayer attacked the Maternity Act of 1921, which established a federal program of grants to states to reduce maternal and infant mortality. The taxpayer alleged that Congress, in enacting the Act, exceeded its powers under Article I of the Constitution. She argued that "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law." Id. at 486.

The Court began its analysis by noting that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld

by a large number of state cases and is the rule of this court." Id. The Court then distinguished federal taxpayers from municipal taxpayers and stated that a federal taxpayer's "interest in the moneys of the treasury . . . is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, [is] remote, fluctuating and uncertain." Id. at 487. Thus, the Court found that the federal taxpayer lacked standing.

In Flast v. Cohen, 392 U.S.83 (1968), the Court created an exception to the bar on federal taxpayer standing in the context of Establishment Clause challenges. The Court asked "whether the Frothingham barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." Id. at 85. To

resolve this issue, the Court noted that a court must "determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Id. at 102. The court then concluded that the nexus requirement for a federal taxpayer contains two aspects. "first, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked." Id. Under this first aspect, a taxpayer can only challenge the unconstitutionality of exercises of congressional power under the Taxing and Spending Clause of Article I, Section 8 of the Constitution. The second aspect requires that a taxpayer establish "a nexus between that status and the precise nature of the constitutional infringement alleged." Id. To satisfy this requirement, a taxpayer must show that the challenged action "exceeds specific constitutional limitations

imposed upon the exercise of the congressional taxing and spending power." Id. at 102-03. In Flast, the taxpayers satisfied both aspects of the required nexus because they challenged a congressional exercise of power under Article I, Section 8 and because they asserted that the congressional expenditures violated the First Amendment's Establishment Clause, which specifically limits the taxing and spending power of Article I, Section 8.

After Flast, the Court consistently has adhered to the "narrow exception [Flast] created to the general rule against taxpayer standing." Bowen v. Kendrick, 487 U.S. 589, 618 (1988). In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), the Court held that federal taxpayers lacked standing to challenge the Secretary of

Health, Education and Welfare's (HEW) decision to give property to a religious institution. The Court rejected the taxpayers' standing argument because the "source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property." Id. at 479. The court also reasoned that "the property transfer about which [the taxpayers] complain was not an exercise of authority conferred by the Taxing and Spending Clause." Id. at 480.[4] Thus, the Court has indicated that Flast applies only to cases in which a federal taxpayer challenges a congressional appropriation made pursuant to Article I, Section 8 that allegedly violates the Establishment Clause of the First

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[4] The Supreme Court has permitted federal taxpayer standing when plaintiffs challenge that the administration of congressional grants violates the Establishment Clause. See Roemer v. Board of Pub. Works, 426 U.S. 736, 744 (1976); Hunt v. McNair, 413 U.S. 734, 735-36 (1973); Tilton v. Richardson, 403 U.S. 672, 676 (1971).

Amendment. See United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974); Flast, 392 U.S. at 114, 115 (Stewart, J., concurring and Fortas, J., concurring); see also Taub v. Kentucky, 842 F.2d 912, 916 (6th Cir.), cert. denied, 488 U.S. 870 (1988).

Both parties mistakenly rely on Flast to resolve whether appellants qualify for taxpayer standing in this case. Flast does not directly govern this appeal because it applies to federal taxpayer standing issues, not questions relating to standing for state taxpayers. Although neither Frothingham nor Flast analyzes questions of state taxpayer standing invoked to challenge state taxes or expenditures, the Supreme Court briefly addressed the issue in Doremus v. Board of Education, 342 U.S. 429 (1952).

In Doremus, New Jersey state taxpayers sued the State of New Jersey seeking a declaratory judgment that a state law authorizing public school teachers to read from the Bible violated the First Amendment. The Court concluded that the plaintiffs lacked standing because they did not allege any direct injury to themselves. The Court stated that

> [t]here is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.

Id. at 433. The Court reiterated that a taxpayer "'must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger

of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" Id. at 434 (quoting Commonwealth of Mass. v. Mellon, 262 U.S. 447, 488 (1923)). The Court held that "[t]he taxpayer's action can meet this test, but only when it is a good-faith pocketbook action." Id. Thus, we must determine whether appellants' action satisfies the "good-faith pocketbook" requirement.

After Doremus, the federal courts have addressed the issue of state taxpayer standing and the type of claim that satisfies the good-faith pocketbook requirement infrequently. In Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984), the Ninth Circuit examined the issue of state taxpayer standing and concluded that the plaintiffs met the Doremus requirements. In Hoohuli, state taxpayers

brought an action challenging a system established by the State of Hawaii that disbursed benefits to residents who had descended from aboriginal inhabitants of the islands. The taxpayers claimed that "their tax dollars were being spent on a program which disbursed benefits based on impermissible racial classifications." Id. at 1172.

After reviewing Frothingham and Doremus, the Ninth Circuit concluded that "[s]tate taxpayers could still maintain taxpayer suits if their pleadings were sufficient. They were sufficient if they set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity." Id. at 1178 (citation omitted). To reach this conclusion, the Ninth Circuit reviewed Flast and its progeny and found that because the Supreme Court did not discuss Doremus in the second part of the Flast

nexus test, it implicitly distinguished between standing requirements for federal and state taxpayers. Id. at 1179. Thus, the Ninth Circuit decided that state taxpayer standing remained unchanged after Flast and must be guided by Doremus in its original form. Id. at 1179-80.

Based on this analysis, the Ninth Circuit held that the plaintiffs had satisfied the "good-faith pocketbook action" of Doremus. Each of the plaintiffs set forth his or her status as a taxpayer. The taxpayers challenged the appropriation, transfer and spending of taxpayers' money from the general fund of the state treasury. Further, the taxpayers alleged that they "ha[d] been burdened with the necessity to provide more taxes to support" the program. Id. at 1180. The Ninth Circuit concluded that "[t]he pleadings set forth with specificity amounts of money appropriated

and spent for allegedly unlawful purposes." Id. Thus, under the test announced by the Ninth Circuit, a taxpayer must satisfy three requirements: (1) taxpayer status; (2) the appropriation of monies from the state's general funds; and (3) the spending of those funds for allegedly unlawful purposes.[5] Under this standard, a taxpayer need not demonstrate that "her tax burden will be lightened by elimination of the questioned expenditure." Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), petition for cert. filed, 60 U.S.L.W. 3406 (Nov. 12, 1991).[6]

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[5] The dissent in Hoohuli argued that the taxpayers lacked standing because they did not demonstrate how the Hawaiian plan increases the taxes they pay. Id. at 1183 (Wallace, J., dissenting). The dissent noted that if the taxpayers had shown a sufficient good-faith pocketbook injury, an "especially acute" dual federalism issue would arise. Id.

[6] In Cammack v. Waihee, the Ninth Circuit found that the same standing requirements that apply to state taxpayers also apply to municipal taxpayers. "[W]e conclude that municipal taxpayer standing simply requires the 'injury' of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing." Id. at 770.

The Eighth Circuit, in Minnesota Federation of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989), agreed with the Ninth Circuit's approach to state taxpayer standing. In Randall, the plaintiffs, a teachers' union and its president, brought an action challenging the constitutionality of the Minnesota Post-Secondary Enrollment Options Act. Pursuant to the Act, public high school students in their junior and senior years could take advanced courses at two- and four-year colleges, some of which were religiously affiliated. The plaintiffs alleged that the Act violated the Establishment Clause of the First Amendment. Protesting the disbursement of tax money to sectarian schools and arguing that reallocation of funds reduced money available for his salary, the president of the teachers' union asserted standing as a taxpayer.

The district court dismissed the suit for lack of standing because it believed that to achieve state taxpayer standing, the plaintiff would have to show an increase in his tax bill under Doremus. Id. at 1357. The Eighth Circuit disagreed, concluding that Doremus did not require a showing of an increased tax burden. The court reasoned that "only a taxpayer really suffers a distinct injury from the improper use of public money in violation of the establishment clause" and "that taxpayer standing was created to specifically permit the airing of establishment claims." Id. at 1358. The Eighth Circuit concluded, "we do not believe that state taxpayers are required to show an increase in their tax burdens to allege sufficient injury." Id.

The Sixth Circuit addressed the issue of state taxpayer standing in Taub v. Kentucky, 842 F.2d 912 (6th Cir.), cert.

denied, 488 U.S. 870 (1988). In Taub, a state taxpayer brought an action against Kentucky, its governor, and other executive officers to prevent them from spending state tax revenues in connection with the construction of an automotive assembly plant. The plaintiff, who paid approximately $1,200 in state property taxes, claimed that "the action of the Commonwealth and various officials of the executive branch amount[ed] to the taking of private property through taxation for other than a public purpose." Id. at 914. After reviewing the federal taxpayer standing cases, the court noted that few cases have addressed the standing of state taxpayers where the Establishment Clause is not an issue, whereas municipal taxpayer standing has been recognized in a variety of contexts. Id. at 917. The Sixth Circuit then noted that challenges to the Establishment Clause create a

unique situation in state taxpayer standing cases. Relying on the Supreme Court's notation in School District of Grand Rapids v. Ball, 473 U.S. 373, 380 n.5 (1985) that the Court has "adjudicated [numerous] Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools," the Sixth Circuit stated that "[t]his observation [by the Supreme Court] points up the distinctive treatment of standing when the Establishment Clause is involved, but does not indicate any rule with respect to other state taxpayer suits." Taub, 842 F.2d at 917.

After undertaking the preceding analysis and reviewing Doremus, the court

> conclude[d] that the requirements for federal taxpayer standing announced in Frothingham control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged. . . . In order to have standing, a state taxpayer must allege direct and

> palpable injury with sufficient specificity to meet the "good-faith pocketbook" requirement of Doremus.

Id. at 918. The Sixth Circuit disagreed with the Ninth Circuit's conclusion in Hoohuli that a state taxpayer must only allege that appropriated funds were spent for unlawful purposes. Id. at 918-19. In addition to this requirement, the court required that "[a] state taxpayer . . . tie such allegations of illegal appropriations and expenditures to a specific claim of some direct and palpable injury threatened or suffered." Id. at 919.

After considering the cases relating to both federal and state taxpayer standing, we conclude that, where an Establishment Clause violation is not asserted, a state taxpayer must allege that appropriated funds were spent for an allegedly unlawful purpose and that the illegal appropriations and expenditures

are tied to a direct and palpable injury threatened or suffered. Only by meeting these requirements will a state taxpayer satisfy the "good-faith pocketbook" requirement of Doremus. A state taxpayer must demonstrate that she will be "out of pocket" because of the allegedly illegal appropriation. Doremus, 342 U.S. at 433.

In reaching this conclusion, we are guided by the Supreme Court's decision in ASARCO, Inc. v. Kadish, 109 S. Ct. 2037 (1989). In ASARCO, numerous individual state taxpayers and the Arizona Education Association, representing approximately 20,000 public school teachers in the State of Arizona, brought a suit in Arizona state court seeking a declaration that a state statute governing mineral leases on state land was void. The plaintiffs challenged the state statute on grounds that it did not comply with the methods Congress required the State to follow

before leasing or selling the lands granted by the United States in the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557. Because the state court interpreted federal law, the Court addressed whether the plaintiffs would have had standing had the action originally been brought in federal court.

The Court noted that the general bar on federal taxpayer suits announced in Frothingham does not necessarily apply to municipal taxpayers "if it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" ASARCO, 109 S. Ct. at 2043 (quoting Frothingham, 262 U.S. at 486-87) (alteration in original). The court then noted that "we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing

upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." Id. (quoting Doremus, 342 U.S. at 434). The Court concluded that the state taxpayers were not entitled to standing because "[t]he possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain,' as stated in Frothingham, supra, and consequently the claimed injury is not 'likely to be redressed by a favorable decision.'" Id. (quoting Valley Forge, 454 U.S. at 472).[7]

After reviewing the reasoning in ASARCO, we conclude that we must reject the Ninth Circuit's formulation of state taxpayer standing because it equates state taxpayers with municipal taxpayers for

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[7] Justice Kennedy garnered only four votes for the portion of the opinion that deals with state taxpayer standing. See ASARCO, 109 S. Ct. at 2053 (Brennan, J., concurring). Because Justice Brennan believed that it was unnecessary to address the state taxpayer standing issue, he did not concur in this part of Justice Kennedy's decision. Justice O'Connor did not take part in the decision.

standing purposes. See Cammack, 932 F.2d at 770 ("we conclude that municipal taxpayer standing . . . mirrors our threshold for state taxpayer standing"). Supreme Court jurisprudence indicates that state taxpayers must be likened to federal taxpayers. Thus, in addition to demonstrating that money was appropriated and spent for an allegedly unlawful purpose, a state taxpayer must show that a distinct and palpable injury resulted from the allegedly illegal appropriation or expenditure. To show such an injury, a state taxpayer must allege that he has suffered a monetary loss due to the allegedly unlawful activity's effect on his tax liability.[8]

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[8] In ASARCO, the Court explained by the plaintiff-taxpayers lacked standing:

> [The taxpayers] have simply asserted that the Arizona statute governing mineral leases has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." Complaint, ¶ III. Even if the first

(continued...)

Requiring a distinct and palpable injury for state taxpayers comports with notions of federalism that are central to our system of government. In the federal taxpayer standing cases, the Supreme Court has restricted standing to prevent the judicial branch from intruding into the provinces of the executive and the legislative branches. We agree with the Sixth Circuit that

> [t]his separation of powers concern has a counterpoint which should be considered when a state taxpayer seeks to have a federal court enjoin the appropriation and spending activities of a state government. Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an "all federal" action.

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[8](...continued)

> part of that assertion were correct, however, it is pure speculation whether the lawsuit would result in any actual tax relief for [the taxpayers].

109 S. Ct. at 2043 (emphasis added).

Taub, 842 F.2d at 919. As the dissent in Hoohuli stated,

> Doremus requires a state taxpayer plaintiff to demonstrate "a good-faith pocketbook action," which appears to parallel the core article III injury-in-fact requirement. But when state taxpayers attack state spending in federal court, another major consideration operates: the integrity of our government's federalist structure. Unnecessary or abstract decisions by federal courts in cases where there is no case or controversy could unduly constrict experimental state welfare legislation and undermine local self-determination.

Hoohuli, 741 F.2d at 1183 (Wallace, J., dissenting) (citations omitted). In this case we have an especially compelling federalism concern that dictates careful attention to the threshold case or controversy requirement of standing. This case involves a citizen initiative effort. The right to initiate legislation is a unique state-created right. The allegations in this case suggest that the

elected chief executive officer of the state cannot take an active official role in the state-created initiative process. We can discern few areas so sacrosanct as protection of state self-determination. The mere allegation of federal constitutional violations cannot be allowed to clothe a state governmental decisionmaking process with the ill-fitting garments of federal court scrutiny. The "direct injury" requirement for standing that has flourished since Frothingham and Doremus and that defines the appropriate litigants in a state taxpayer case proves yet again the wisdom of the Framers of the Constitution when they tied federal court jurisdiction to the "case or controversy" requirement and its attendant standing, ripeness, and mootness doctrines. This case proves the continuing importance of judicial vigilance over these time-tested

doctrines. Absent such vigilance, we would seriously undermine the constitutional commitment to federalism.

In this case, appellants allege that funds were appropriated and spent for an unlawful purpose; however, they do not allege a distinct and palpable injury that results from an increased tax liability. Instead, appellants merely allege that the Governor's allegedly illegal activities forced them to spend additional funds to offset his efforts. "[A] taxpayer alleges injury only by virtue of his liability for taxes." Valley Forge, 454 U.S. at 478. Appellants have not alleged that they have suffered any injury whatsoever as a result of paying increased taxes to fund the Governor's activities. Because appellants have not alleged an injury related to tax liability, they have not shown that they have suffered a distinct and palpable injury as a result of the allegedly

illegal appropriations or expenditures. Thus, the individual appellants do not satisfy the good-faith pocketbook requirement of Doremus and are not entitled to standing as state taxpayers. Likewise, the Colorado Taxpayers Union lacks associational standing because its members do not have standing as taxpayers to sue in their own right. Hunt, 432 U.S. at 343.

Accordingly, both the individuals and the two associations lack standing to challenge the alleged illegality of the Governor's activities. The appeal is **DISMISSED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-M-1818

COLORADO TAXPAYERS UNION, INC.; COLORADO LIBERTARIAN PARTY; MARY LIND; DAVID AITKIN; VERN BICKEL; PASQUALE FRANCOMANO; CLYDE HARKINS; and BASIL R. WALTON, JR.,

Plaintiffs,

v.

ROY ROMER, individually and as Governor of the State of Colorado; CITIZENS FOR REPRESENTATIVE GOVERNMENT; PHIL FOX; CLARK SHAW; and DOES 1 through 20,

Defendants.

Memorandum Opinion and Order.

MATSCH, JUDGE.

The plaintiffs in this civil action publicly proposed adoption of a citizen initiated amendment to the Colorado Constitution by the electorate in the 1988 general election. That proposal, Amendment 6 on the ballot, was publicly opposed by the incumbent Governor, Roy Romer, and the defendant organization,

Citizens for Representative Government, of which Phil Fox and Clark Shaw were members. The plaintiffs seek relief under 42 U.S.C. § 1983, claiming that Governor Romer violated their rights protected by the First Amendment to the United States Constitution by the use of state resources and the power and prestige of his office to advocate defeat of Amendment 6. They also assert that the Governor and the other defendants combined in a conspiracy to violate the plaintiffs' constitutional rights, contrary to 42 U.S.C. § 1985(3) and common law. Legal issues have been presented on cross motions for summary judgment.

I. Standing

The defendants deny the plaintiffs' standing to bring this action, arguing that because the plaintiffs could vote, associate, speak out, and petition in the 1988 election, they were not harmed by the

Governor's activities against the amendment. The defendants also contend that the Colorado Libertarian Party has no claim because it is a political party whose primary purpose is to elect candidates, not pass initiatives.

The plaintiffs have alleged sufficient injury for standing. Allen v. Wright, 468 U.S. 737, 751 (1984) ("plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"); see also Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 (1978) (to assert standing, individual must show that he has suffered or will incur some injury in fact that is both distinct and palpable). This challenge to governmental action as an unconstitutional interference with the First Amendment rights of supporters of a citizen

initiative presents "'a claim of present objective harm or a threat of specific future harm.'" Meese v. Keane, 481 U.S. 465, 472 (1987) (quoting Laird v. Tatum, 408 U.S. 1 (1972)); see also Common Cause v. Bolger, 512 F. Supp. 26, 30 (D.C.D.C. 1980) (candidates challenging incumbents were injured by congressional franking privilege and therefore could show sufficient injury in that franking forced challengers to raise additional funds). In a similar case, this court held that voter-taxpayers had standing to challenge the actions of a school board in opposing an amendment to the state constitution. See Campbell v. Arapahoe Cty. Sch. Dist. No. 6, 90 F.R.D. 189, 192 (D. Colo. 1981), aff'd, 704 F.2d 501 (10th Cir. 1983). The issues are not moot because the same plaintiffs are proponents of another initiative, Amendment 1 on the 1990 general election ballot in Colorado.

The claimed injury is traceable to the defendants' activities. Allen v. Wright, 468 U.S. at 751; see also Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 262 (1977). The harm consists of the additional burden imposed on the plaintiffs by the defendants' allegedly unconstitutional acts. Like the plaintiffs in Common Cause v. Bolger, the plaintiffs here have alleged that their campaign for Amendment 6 would not have been so difficult (and, in fact, might have been successful) but for the defendants' acts.

The Colorado Libertarian Party is a qualified political organization under Colorado law. See C.R.S. § 1-1-104(17). The statute defines "political organization" as "any group of registered electors who, by petition for nomination of an independent candidate as provided in

section 1-4-801, places upon the official general election ballot nominees for public office." Nothing in the statute prohibits a political organization from supporting a citizen initiative. The defendants have produced nothing to contest the allegations that the plaintiff organizations, including the Colorado Libertarian Party, represent people supporting Amendment 6 in 1988 and Amendment 1 in 1990. Accordingly, both the individual and organizational plaintiffs have standing to challenge the defendants' actions in the 1988 election.

II. **First Amendment**

The Colorado Constitution affirms that "[a]ll political power is vested in an derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Colo. Const. Art. II, § 1.

The people of Colorado have "reserve[d] to themselves the power to propose laws and amendments to the [state] constitution and to enact or reject the same at the polls independent of the general assembly. . . . The veto power of the Governor shall not extend to measures initiated by . . . the people." Colo. Const. Art. V, § 1; see also Colorado Project--Common Cause v. Anderson, 495 P.2d 218 (Colo. 1972) (recognizing importance of initiative to exercise of people's political power). In striking down a Colorado statute that had prohibited the use of paid petition circulators in initiative campaigns, the United States Supreme Court recognized that this right to initiate laws implicates the First Amendment "at its zenith." Meyer v. Grant, 486 U.S. 414, 425 (1988). Although the Governor possesses "the supreme executive power of the state," Colo. Const. Art IV, § 2,,

that power is only what has been delegated by the people who retain their sovereignty. The Governor has no official role to play in the consideration of a constitutional amendment proposed by an initiative. Rocky Ford v. Brown, 293 P.2d 974, 975-76 (Colo. 1956) (city attorney could not advise city council prior to election that ordinance proposed by initiative would be invalid).

The essence of the plaintiffs' position is that when the Governor becomes an advocate against a citizen initiative, he has exceeded the limits of his official power and interfered in the process by which the people exercise their sovereign right to change the authority of the officials who govern them. The principle that public funds collected from taxation may not be used to support opposition to an initiated measure was recognized in Mountain States Legal Fdn. v. Denver Sch.

Dist., 459 F. Supp. 357, 360-61 (D. Colo. 1978), where this court said that

> [a] use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgement of those fundamental freedoms. Specifically, where the proposal in question--placed before the voters in the exercise of the initiative power--seeks fundamentally to alter the authority of representative government, opposition to the proposal which is financed by publicly collected funds has the effect of shifting the ultimate source of power away from the people. . . . Publicly financed opposition to the exercise of that right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado.

See also Campbell v. Arapahoe Cty. Sch. Dist., 90 F.R.D. 189 (D. Colo. 1981); Stanson v. Mott, 551 P.2d 1, 8 (Cal. 1976) ("every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes

improper"); and Citizens to Protect Public Funds v. Board of Education, 98 A.2d 673, 677 (N.J. 1953) ("[t]he public funds entrusted to the board belong equally to the proponents and opponents of the proposition").

This is not a public expenditure case. Almost all of the outlay involved in the Governor's campaign against Amendment 6 was reimbursed by Citizens for Representative Government and the few remaining out-of-pocket incidental expenses identified by the plaintiffs are de minimis. Although the plaintiffs allege that members of the Governor's staff devoted state-paid time to the anti-Amendment 6 campaign, they offer no proof of time actually spent on such activity. The plaintiffs contend that reimbursement of expenses of the Governor's anti-Amendment 6 campaign was not curative because the state effectively "loaned" its

resources in violation of Article XI, section 1 of the Colorado Constitution, which prohibits the state from lending or pledging its credit. That particular claim is not properly before this court in this action under 42 U.S.C. § 1983. Jurisdiction in this case is limited to violations of Federal law.

The plaintiffs argue that the Supreme Court recognized that elections may be unduly influenced by institutional power in Austin v. Michigan Chamber of Commerce, _____, U.S. _____, 58 L.W. 4371 (Mar. 27, 1990). There, the Court denied the contention that a Michigan statute prohibiting contributions from business corporations to campaigns for elective office violated any rights protected by the First Amendment. The Court concluded that the state legislature had shown a sufficiently compelling governmental interest in avoiding possible corruption

of the elective process by business organizations possessing economic power developed through favorable state laws. In contrast, the defendants rely on First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) to claim First Amendment protection for their opposition campaign. There, the Supreme Court voided a Massachusetts statute prohibiting business corporations from contributing to initiative and referendum campaigns, unless the issue in the campaign affected the "business, property, or assets of the corporation." First National Bank of Boston v. Bellotti, 435 U.S. at 768. The Court was unsympathetic to the argument that corporate speech would "exert an undue influence on the outcome of a referendum vote," since there had been no showing of such influence in the election. Id. at 789. The Court noted that "the concept that government may restrict the

speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Id. at 790-91 (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

Reconciling these two opinions is difficult. Neither case is controlling here. Fundamental principles of constitutional law must not depend upon subjective judgments about the relative power of participants in public debate to influence the electorate. The First Amendment does not have an egalitarian function. It may not be used to equalize an imbalance of resources or to increase or diminish the persuasive power of the competitors for public support. The protection it grants is freedom to speak; not freedom from conflicting speech. The objective is to preserve a free market for ideas. See Abrams v. United States, 250

U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

The plaintiffs protest the content of Governor Romer's presentations, claiming that he misrepresented material facts and treated Amendment 6 with contempt. In Brown v. Hartlage, 456 U.S. 45, 60 (1982), the Supreme Court recognized the chilling effect on political debate that would follow any effort to require accuracy or to prohibit hyperbole and colorful phrasing.

The plaintiffs also contend that the Governor infringed upon their rights by assisting in organizing and orchestrating the campaign against Amendment 6 and by pressuring business organizations to contribute money and influence to the opposition. Fear of unspecified

"reprisals" is said to be the method. The plaintiffs have provided no evidence of any violation of any federal or state law or regulation by the Governor or his allies.

The fundamental flaw in the plaintiffs' contentions is the failure to distinguish between governmental interference with an initiative and opposition to it from persons occupying positions in government. There is a difference between the conduct of public officials in speaking out on controversial political issues and their use of governmental power to affect the election. Coercion is the core of power in government. Whether that coercion is applied directly through compulsory or prohibitory laws or indirectly through taxation and expenditure, the use of that power is limited by constitutional controls, including the First Amendment.

These limitations on power are not restrictions on the freedom of elected officials to participate in the debate of public issues. The Governor is a political personage. His powers of persuasion are attributes of his personality as well as his position. When those personal powers are not linked to the levers of the coercive authority of the government he heads, there is no governmental interference with the First Amendment rights of those opposing him on an issue.

The plaintiffs contend that the Governor's use of a state-owned airplane, automobile, and security personnel are inappropriate. While government funds are involved, these expenditures are incidental. They enhance and extend the reach of the political person; increasing his opportunity to perform his official duties and to communicate with people.

These traditional perquisites are merely enlargements of the political personage which are not separable from the man in office. The official position is a part of the person of the incumbent at all times. Governors have no duty shifts or time off.

III. **The Conspiracy Claim**

The plaintiffs allege a conspiracy under 42 U.S.C. § 1985(3) and common law. The section 1985 claim is barred due to the plaintiffs' failure to demonstrate any class-based animus. See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1272 (10th Cir. 1989).

The only common law conspiracy claim within the federal question jurisdiction of this court is a conspiracy to violate the plaintiffs' First Amendment rights.

The plaintiffs have failed to show anything more than some combination of

efforts to persuade the electorate to reject Amendment 6. That is not an unlawful goal. The plaintiffs have also failed to show the use of any unlawful means to reach that goal. There is no showing of support for the conspiracy claim.

Upon the foregoing, it is

ORDERED that the plaintiffs' motion for summary judgment is denied, and it is

FURTHER ORDERED that the defendants' motions for summary judgment are granted, and this civil action is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-M-1818

COLORADO TAXPAYERS UNION, INC.,
COLORADO LIBERTARIAN PARTY,
MARY LIND, DAVID AITKIN, VERN BICKEL,
PASQUALE FRANCOMANO, CLYDE HARKINS,
and BASIL R. WALTON, JR.,

Plaintiffs,

v.

ROY ROMER, individually, and as
Governor of the State of Colorado;
CITIZENS FOR REPRESENTATIVE GOVERNMENT,
PHIL FOX, CLARK SHAW, and DOES 1 through
20,

Defendants.

First Amended Complaint,
dated April 11, 1989.

Plaintiffs, by and through their attorney, complain as follows:

NATURE OF THE ACTION

Plaintiffs, who were proponents of a citizen initiated amendment for the limitation of taxes placed on the ballot in the general election in November, 1988 ("Amendment No. 6"), bring suit against

Governor Roy Romer for using the power of his office and monies from the state treasury to propagandize against Amendment No. 6 and against all Defendants for conspiring to use the governor's power and office and state treasury monies to fund and further their campaign to defeat Amendment No. 6, in violation of the First and Fourteenth Amendments to the United States constitution.

I. JURISDICTION AND VENUE

1. This action arises under the Constitution of the United States and the provisions of 42 U.S.C. § 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1342(3), and 42 U.S.C. § 1983. Declaratory relief is authorized by 28 U.S.C. § 2201 and FED. R. CIV. P. 57.

II. PARTIES

2. Plaintiff Colorado Taxpayers Union, Inc., also known as the Colorado

Union of Taxpayers ("CUT"), is a Colorado non-profit corporation dedicated to being a counter-balancing force against tax and spend lobbies. Among its members are proponents, qualified signers and circulators of Amendment No. 6.

3. Plaintiff Colorado Libertarian Party ("Libertarian Party"), is a qualified political organization dedicated to limiting government. Among its members are supporters, qualified signers and circulators of Amendment No. 6.

4. The remaining Plaintiffs are active supporters, qualified signers and circulators of Amendment No. 6, as well as residents, registered voters, and taxpayers of Colorado.

5. Defendant Romer is a resident of the State of Colorado and holds the office of Governor of Colorado.

6. Plaintiffs are informed and believe and based thereon allege that

Defendant Citizens for Representative Government ("CRG") is a Colorado non-profit corporation dedicated to defeating tax limitation initiatives, including Amendment No. 6.

7. Defendants are informed and believe and based thereon allege that Phil Fox and Clark Shaw are residents of Colorado, principal leaders of CRG and responsible for the actions alleged below.

8. Defendants are informed and believe and based thereon allege that there are additional members of CRG responsible for the violations alleged herein. The exact identities of said members are unknown to Plaintiffs, and therefore, said members are sued as Does one through twenty. Plaintiffs will amend the complaint to name specific individuals when same become known through discovery.

III. STATEMENT OF CLAIM

FIRST CLAIM FOR RELIEF

9. Amendment No. 6 on the ballot of the general election of November 8, 1989, is entitled "An Amendment to Article X of the Colorado Constitution to require voter approval for certain increases in state and local government tax revenues, to restrict property, income, sales and other taxes, and to limit the rate of increase in state spending." Amendment No. 6 is a citizen initiated amendment placed on the ballot pursuant to freedoms of speech and rights of people to petition government for redress of grievances, guaranteed by the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment.

10. Defendant Romer, as governor, authorized and caused publicly owned resources to be used to propagandize against Amendment No. 6. He authorized and caused the state's airplane to be used by CRG in the campaign to defeat Amendment

No. 6. He used his office and office employees to assist CRG in its phone and mail campaigns and authorized and caused postage charges for such mail campaign to be paid out of state treasury funds.

11. Defendant Romer used his leverage as governor to pressure corporations and individuals into making contributions to CRG for the defeat of Amendment No. 6 by making promises or innuendoes of official help in exchange for contributions or threats that retaliation would occur or official support would be withdrawn if such contributions were not made. Defendant Romer used his office as a conduit to receive and collect said contributions and deliver them to CRG.

12. Defendant Romer used his office staff and supplies to send out letters in opposition to Amendment No. 6. He set aside duties as governor to travel around

the state delivering speeches against Amendment No. 6 in an all-out effort over several weeks before the election to defeat Amendment No. 6.

13. Said actions of Defendant Romer have injured Plaintiffs by reducing Plaintiffs' effectiveness in their attempt to persuade the people of Colorado to exercise their power to fundamentally alter the authority of government. Defendant Romer's use of public resources to oppose Amendment No. 6 deprives Plaintiffs of freedom of speech and the right to petition the government for redress of grievances, in violation of the First and Fourteenth Amendments to the United States Constitution.

14. Defendant Romer, as Governor, has acted under color of state law, statute, regulation, custom or usage to deprive the Plaintiffs of rights, privileges and immunities secured by the

Constitution and the laws of the United States.

15. Defendant Romer, individually, knew or reasonably should have known, that the improper use of his office to campaign against the citizen initiative and the appropriation of public resources to urge rejection of same would violate the constitutional and civil rights of the Plaintiffs as clearly established by law.

16. Defendant Romer, individually, should reimburse the treasury of the State of Colorado for all sums spent by him or under his direction from the state treasury for public employee salaries, including his own, and the reasonable value of other public resources improperly devoted to the campaign against Amendment No. 6.

17. Plaintiffs are entitled to recover their costs and attorney's fees from Defendant Romer, in his individual

capacity, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 US.C. § 1988.

18. Defendant Romer knew that his actions would deprive Plaintiffs of their constitutional rights and yet engaged in the above-alleged activities with a reckless indifference, callous disregard, and gross negligence for the law, entitling Plaintiffs to punitive damages in the amount of $1,000,000.

19. Unless permanently enjoined from continuing to authorize the use of public resources to oppose citizen initiated amendments, Defendant Romer will continue to engage in the deliberate violation of the constitutional rights of Plaintiffs, and Plaintiffs will continue to suffer violations of their constitutional rights which constitute irreparable injury for which Plaintiffs have no adequate remedy at law.

20. An actual controversy concerning the constitutional rights of Plaintiffs and Defendant Romer's duty not to abrogate those rights exists, entitling Plaintiffs to a declaration that Defendant Romer's above-alleged activities violated Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

IV. SECOND CLAIM FOR RELIEF

21. Plaintiffs incorporate by reference paragraphs 1. through 20. of this Complaint and make the same a part hereof as if set forth in full.

22. Defendants Romer, CRG, Phil Fox, Clark Shaw and Does 1 through 20 acted in concert to deprive Plaintiffs of their constitutional rights. Said Defendants agreed to use the power of the governor's office and expenditures of public resources, as alleged above, to campaign

against Amendment No. 6 and deprive Plaintiffs of their constitutional rights.

23. Said actions constitute a conspiracy in violation of 42 U.S.C. § 1983 and entitle Plaintiffs to compensatory damages.

24. All Defendants, jointly and severally, should reimburse the state treasury for the value of all public resources improperly used to wage opposition to Amendment No. 6.

25. Said conspiring Defendants knew that their actions would deprive Plaintiffs of their constitutional rights and yet engaged in the above-alleged activities with a reckless indifference, callous disregard and gross negligence for the law, entitling Plaintiffs to an award of punitive damages against all Defendants, jointly and severally, in the amount of $1,000,000.

26. Unless all Defendants are permanently enjoined from continuing to use public resources to oppose citizen initiated amendments, all Defendants will continue to engage in the deliberate violation of the constitutional rights of Plaintiffs, and Plaintiffs will continue to suffer violations of their constitutional rights which constitute irreparable injury for which Plaintiffs have no adequate remedy at law.

27. An actual controversy exists between Plaintiffs and all Defendants concerning the unconstitutionality of Defendants' activities, entitling Plaintiffs to a declaration that all Defendants' above-alleged activities violated Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

V. PRAYER

Wherefore, Plaintiffs pray for judgment against Defendants and for Plaintiffs as follows:

A. For a declaration that the actions of all Defendants in using the power of the governor's office and public resources to fund their campaign against Amendment No. 6 violates the First and Fourteenth Amendments to the United States Constitution.

B. For compensatory damages against Defendant Romer for depriving the Plaintiffs of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983.

C. For compensatory damages against all Defendants, jointly and severally, for conspiring to deprive Plaintiffs of their constitutional rights in violation of 42 U.S.C. §1983.

D. For punitive damages in the amount of $1,000,000 against all Defendants, jointly and severally, for depriving Plaintiffs of their constitutional rights.

E. For mandatory injunction against Defendant Romer, in his individual capacity, and all other Defendants, jointly and severally, to reimburse the treasury of the State of Colorado for the value of public resources illegally appropriated and expended in violation of the Plaintiffs' constitutional rights.

F. For permanent injunction against all Defendants from using, or conspiring to use, the power of any official position or public resources to urge the rejection of any taxpayer petition, and from interfering with any tax limitation measure that might be included on the ballot in the next general election or any future elections.

G. For Plaintiffs' costs and attorney's fees.

H. For such other further and different relief as the Court may deem just in the circumstances and to prevent further governmental interference by Defendants with the rights of Plaintiffs in future initiative elections.

AFFIDAVIT OF STEVEN FEDEROWICZ

Being duly sworn and under oath, I, Steven Federowicz, say and declare as follows:

1. I make this affidavit in connection with the lawsuit entitled Colorado Union of Taxpayers, et al., v. Roy Romer, et al., Case No. 88-M-1818, United States District Court, District of Colorado.

2. I have personal knowledge of the facts set forth below and if called to testify, can and would competently testify to the matters contained herein.

3. That I reside at 2755 S. Decator St., Denver, CO 80236.

4. That in 1988, I was the President of the College View PTA and in mid to late October I received a letter from Governor Romer. The letter was an original on state stationary and in an official envelope. A true and exact copy

of the same letter is attached as exhibit A.

5. The PTA is a cooperative organization for parents and teachers to help kids.

6. The Governor's letter, implying the power of his office, intimidated me. It was sent as a matter of "utmost urgency" and seemed to suggest that I must act out of fear of the consequences and/or out of the fear of the Governor's power. The message I got was if I didn't act, I was going to suffer. I was being forced to influence my PTA members to oppose an amendment.

7. The Governor's letter, coupled with the highly charged one sided public opinion campaign, intimated that if I didn't cooperate, I was a disgrace or anti-American or something.

8. It was plainly an attempt to intimidate me and provoke me against the

initiative. I felt I was being coerced to join his campaign against the amendment.

Executed and duly sworn June 1, 1990.

AFFIDAVIT OF CONRAD AND ISABEL KRIEGER

Being duly sworn and under oath, WE, Conrad and Isabel Krieger, say and declare as follows:

1. We make this affidavit in connection with he lawsuit entitled Colorado Union of Taxpayers, et al., v. Roy Romer, et al., Case No. 88-M-1818, United States District Court, District of Colorado.

2. We have personal knowledge of the facts set forth below and if called to testify, can and would competently testify to the matters contained herein.

3. That in 1988 and currently we reside at 4120 S. Elati, Englewood, CO. We were and are validly registered voters. We both voted in the 1988 election which contained the Tax limitation Amendment #6.

4. At the beginning of the campaign of the tax limitation amendment, we both

had every intention of voting for the amendment.

5. However, during the last two weeks or so before the election or at that juncture when Governor Romer became actively involved against the amendment, making statements that the amendment would drastically cut property taxes and jeopardize public education along with police and fire protection, etc., we decided to change our decision and vote against the amendment. Our decision to change our votes was directly the result of Governor Romer's concern, and the tremendous effort he seemed to put in to fighting the amendment.

6. We changed our votes because we believed the Governor would tell us the truth on such things, and we were therefore concerned that our son-in-law, an employee of Jefferson County Schools, might lose his job.

7. We looked and listened to hear what the Amendment #6 people were saying about the Governor's statements, but did not really hear or learn anything about their position.

Executed and duly sworn June 1, 1990.

AFFIDAVIT OF TERRY CONSIDINE

Being duly sworn and under oath, I, Terry Considine, say and declare as follows:

1. I make this affidavit in connection with the lawsuit entitled Colorado Union of Taxpayers, et al., v. Roy Romer, et al., Case No. 88-M-1818, United States District Court, District of Colorado.

2. I have personal knowledge of the facts set forth below and if called to testify, can and would competently testify to the matters contained herein.

3. In 1988 I served as a Colorado State Senator.

4. I was interested in the Amendment #6 campaign. I spoke to public officials regarding my observations, and also elicited their comments. I generally followed the campaign in the media and elsewhere.

5. It was my observation that public opinion surrounding Amendment #6 was set by Governor Romer. The public opinion which he set was extremely one sided and adverse to the petition.

6. From a political perspective, the Governor's fervent involvement in the campaign to defeat the amendment was material. The Governor's high popularity, strong leadership style and the fear of possible official reprisal created tremendous political pressure on both public officials and others to join the opposition campaign.

7. I observed that the Governor was the visible leader of the opposition campaign. I observed that joining his campaign and urging its rejection was popularized as the political thing to do. The opposition took on a frenzied air. For example, to the best of my recollection the Denver Post printed

numerous opposing editorials. The frenzy predicted absolutely dire consequences if the measure passed.

8. During the Governor's campaign, without regard to the merits of the measure, I observed a condition--an environment that tended to chill me and would have chilled any politically sensitive individual, from publicly opposing the Governor's position.

9. It was my observation that the Governor's high profile campaign greatly contributed to the loud chorus of criticism against Amendment #6. This loud chorus, following his lead, made it extremely difficult for the proponents of the amendment to rebut adequately the onslaught of criticism, which in my estimation was significantly overstated.

10. I believe, based upon my knowledge of the facts of the measure, and my observation of the political events at

the time, the Governor's campaign limited the voting public's opportunity to judge fairly the measure's merits. It is also my opinion that the Governor's campaign had the effect of controlling the public debate of the measure, directing the public mind against the measure.

Executed and duly sworn June 14, 1990.

EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203-1292
Phone (303) 866-2471

[State Seal]

Roy Romer
Governor

October 24, 1988

NEWS RELEASE

Colorado Gov. Roy Romer Tuesday will launch a statewide series of meetings as part of his efforts to defeat Amendment 6, the so-called Taxpayer's Bill of Rights.

Romer will open the series of at least nine meetings with a 7 a.m. Tuesday breakfast session at the Holiday Inn in Pueblo.

"I am conducting an all-out blitz to defeat this amendment," Romer said. "I must devote a substantial portion of my time to this effort during the next two weeks because I am convinced that if this amendment passes, Colorado will be brought to its knees.

"I am a very tight-fisted manager. I intend to run state government in the most efficient, frugal manner possible. But, if this amendment passed and major governmental funding sources were slashed, government at all levels in Colorado would be brought to a standstill."

The Governor noted that his efforts are part of the bipartisan campaign now underway throughout Colorado in which Republican and Democratic businessmen, civil leaders, governmental officials and private citizens are joining together to oppose Amendment 6.

. . .

The Code of Colorado Regulations
12CR5,5-89

TITLE TRAVEL

. . .

1.20 TRAVEL POLICIES

1.21 Travel on State Business

It is the responsibility of the traveler, his or her immediate supervisor, and the approving authority to assure that all travel charged to the State, regardless of the sources of funds, is accomplished for the benefit of the State and that such travel is completed at the most reasonable cost.

.01 For the "Benefit of the State" refers to those expenses which enable a State official or agency to carry out responsibilities or functions as required by law. Expenses incurred in relation to non-political ceremonial functions of a State office would normally be for the benefit of the State. Expenses incurred in relation to activities, the primary purpose of which is the election or reelection of a State official, are not for the benefit of the State.

.02 Personal and/or Political Expenses are those which are not directly related to official

functions or programs of a State agency or office. Political expenses are those incurred in relation to activities which are primarily designed to further the interests of an individual, political party, or special interest group of a political nature. In determining whether particular expenses are of benefit to the State or are personal or political, all of the circumstances should be examined to determine the primary purpose of the activity involved. Some of the circumstances which would be relevant are:

a. Whether or not the official is an announced candidate for elective office.

b. Whether or not the official is in a candidate status for reporting purposes under the Campaign Reform Act, CRS, 1-45-101.

c. Nature of the organization addressed or attended.

d. Issues addressed in the speech.

e. Tax consequences of such expenses under the rules and regulations adopted pursuant to the Internal Revenue Code would be a relevant consideration.

It is the responsibility of the State official or employee to make the

determination as to whether expenses are for the "benefit of the State," personal or political.

Section 1-45-116 prohibits the use of public funds, or supplies or equipment for a political campaign involving the nomination, retention, or election of any person to public office. Also see 24-50-132, CRS.

In some cases, a given expenditure may not be clearly one or the other or it may be both official business and personal or political. In this event, the individual involved will have to make some reasonable allocation of the expenses between official business of the State and personal or political expenses. Where such an allocation is made, the travel reimbursement request shall indicate the allocation made and the basis for such allocation.

In the case of the Governor of the State, security, protocol, ceremonial functions, and overall demands on his time require travel considerations not accorded any other State official or employee. Protocol will often require the Governor's spouse to accompany him when traveling, both in state and out of state.

The Governor's use of State-owned aircraft, commercial airlines or State autos will depend upon time constraints and security needs.

When the Governor must allocate travel costs between official State business and personal or political purposes, the allocation will take

into account all the various factors involved in the trip.

1.22 Prior Authority to Travel

.01 In-State Travel - Prior authorization by the approving authority is required for all in-state travel.

[State Seal]

Official Letterhead of the
State of Colorado
Department of Law

January 30, 1990

Kathleen Curtis, Esq.
19 Old Town Square
Suite 238
Fort Collins, Colorado 80524

Dear Ms. Curtis:

In response to your informal inquiries, I am submitting responses from Cathy Walsh, Patricia Lackner and John Levine. Ms. Walsh is the legislative liaison and Ms. Lackner is the office manager. Mr. Levine is an employee in the Governor's Office who maintains some of the records in the office.

Cathy Walsh

Answer to interrogatory 6. Only a few employees worked on Amendment 6. They are Ken Salazar, legal counsel to the Governor; Gary Reiff, policy analyst;

Cathy Walsh, legislative liaison; Cindy Parmenter, press secretary; Margaret Lee, secretary to Mr. Salazar at the time; and B. J. Thornberry, deputy chief of staff.

Patricia Lackner

Response to document request no. 1.

See attached Exhibit A.

Response to document request no. 1.

We could find no record of contribution made to the Governor's Office for Amendment 6.

Response to document request no. 3.

No contributions received.

United States Constitution

Article III, Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for the Services a Compensation, which shall not be diminished during their Continuance in Office.

* * *

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and the petition the Government for a redress of grievances.

* * *

United States Constitution

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COLORADO REVISED STATUTES

Campaign Reform Act

§ 1-45-116. State and political subdivisions - limitations on contributions. (1) (a) No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution or contribution in kind in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys from any source, or make any contributions in kind, to urge electors to vote in favor of or against any issue before the electorate. However, a member or employee of any such agency, department, board, division, bureau, commission, or council who has policy-making responsibilities may expend not more than fifty dollars of public

moneys in the form of letters, telephone calls, or other activities incidental to making himself available to the press or the public for the purpose of responding to questions about any such issue or to express his opinions on any such issue.

(b) (I) Nothing in this subsection (I) shall be construed as prohibiting an agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof from expending public moneys or making contributions in kind to dispense fair and balanced information on any issue of official concern before the electorate.

(II) Nothing in this subsection (I) shall be construed as prohibiting an agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof from passing a resolution or taking a

position of advocacy on any issue before the electorate.

(c) Nothing in this subsection (I) shall be construed as prohibiting a member or an employee of an agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof from expending personal funds, making contributions in kind, or using personal time to urge electors to vote in favor of or against any issue before the electorate.

(2) The provisions of subsection (I) of this section shall not apply to:

(a) An official residence furnished or paid for by the state or a political subdivision;

(b) Security officers who are required to accompany a candidate or the candidate's family;

(c) Publicly owned motor vehicles provided for the use of the chief

executive of the state or a political subdivision;

(d) Publicly owned aircraft provided for the use of the chief executive of the state or of a political subdivision or his family for security purposes; except that, if such use is, in whole or in part, for campaign purposes, the expenses relating to the campaign shall be reported and reimbursed pursuant to subsection (3) of this section.

(3) If any candidate who is also an incumbent inadvertently or unavoidably makes any expenditure which involves campaign expenses and official expenses, such expenditure shall be deemed a campaign expense only, unless the candidate, not more than ten working days after such expenditure, files with the appropriate officer such information as the secretary of state may by rule require in order to differentiate between campaign

expenses and official expenses. Such information shall be set forth on a form provided by the appropriate officer. In the event that public moneys have been expended for campaign expenses and for official expenses, the candidate shall reimburse the state or political subdivision for the amount of money spent on campaign expenses.

1-45-117. Campaign funds - use restricted. No candidate or campaign treasurer shall use any contribution or contribution in kind received from any person for private purposes not reasonably related to influencing the passage or defeat of any issue or the nomination, retention, election, or defeat of any candidate or to voter registration or political education. Contributions not expended on behalf of the candidate's campaign, upon approval of the candidate

or political committee, may be contributed to the county or state central committee of that candidate's political party or any other political committee on file with the appropriate officer pursuant to 1-45-106.

Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-640

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COLORADO TAXPAYERS UNION, INC. et al.,
Petitioners,
vs.
ROY ROMER, individually, and as Governor of the State of Colorado et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-640

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COLORADO TAXPAYERS UNION, INC. et al.,
Petitioners,
vs.
ROY ROMER, individually, and as Governor of the State of Colorado et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Roy Romer, individually and as Governor of the State of Colorado, respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case. The Tenth Circuit opinion is reported at 963 F.2d 1394 (10th Cir. 1992). The District Court opinion is reported at 750 F. Supp. 1041 (D. Colo. 1990).

STATEMENT OF THE FACTS

In 1988, a tax initiative, which would have allowed citizens to vote directly on increases in taxes, was placed on the ballot. Roy Romer, in his capacity as Governor, actively opposed the initiative. In the course of expressing his position, the Governor used certain state resources, including the state airplane, state automobiles and security personnel.

The petitioners filed a lawsuit in the United States District Court for the District of Colorado. They claimed that the Governor violated their First Amendment rights by using state resources and the power and prestige of his office to oppose the Amendment. The Governor asserted that the petitioners lacked standing. The district court found that the petitioners had standing to sue but that the petitioners failed to state a claim. The petitioners appealed, and the Governor cross-appealed on the issue of standing. The Court of Appeals dismissed the appeal on the ground that the petitioners lacked standing.

Contrary to petitioners' assertions, the state resources were directly related to the Governor's speech activities and were *de minimus*.

A. Transportation

Governor Romer did use the state plane twice to transport him to locations where he presented his views about the amendment. On October 25, 1988, the plane was used for a trip to Pueblo, at a cost of $330 for 1.2 hours of aircraft time. On October 28, 1988, the plane was used for trips to three locations, at a cost of $660 for 2.4 hours of aircraft time. Private organizations reimbursed the State for these costs.

The Governor also used state automobiles on occasion to transport him to sites. Pursuant to state fiscal rules, the Governor is entitled to a state car for both personal and business functions.

B. Mailings

Mailing costs were insignificant. Other than individual responses to letters expressing views on the amendment, to which any Governor is obliged to respond, only six letters containing the

Governor's signature and referring to Amendment 6 were identified. The text of each letter was similar. Though no one on the Governor's staff has a clear recollection of who drafted the letter, it is likely that the letters were drafted and typed in the Governor's office. It is customary that the correspondence is edited in the Governor's Press Office.

Two letters were printed and distributed at the expense of the AFL-CIO and Blue Cross/Blue Shield of Colorado respectively. The costs of two other letters were paid by political committees.

Two letters were printed in and distributed from the Governor's office to school districts. These letters were sent to 528 school officials. The cost of producing copies totaled $19.53; the cost of envelopes totaled $4.74; and the cost of postage totaled $132. A private organization reimbursed the State for the postage.

C. Governor's and Staff's Time

The Governor did not set aside any pre-scheduled duties in order to speak against the amendment. The Governor instead fit his amendment activities into his schedule as other commitments permitted. The Governor's staff was used primarily to analyze the amendment and to advise the Governor about its impact.

D. State Mansion and Security Personnel

The petitioners have complained about the use of the state mansion and of security officers. The Governor is entitled to use the mansion for both personal and professional reasons because it is his living quarters. The security personnel are needed to protect the Governor whether the Governor is performing an official function or a personal function. Colo. Rev. Stat. § 1-45-116(2) (1992 Supp.).

REASONS WHY THE PETITION SHOULD BE DENIED

I. FEDERAL CIRCUIT COURTS HAVE UNIFORMLY DETERMINED THAT PERSONS SUING IN THEIR CAPACITIES AS VOTERS AND CITIZENS DO NOT HAVE STANDING TO SUE UNDER THE FACTS ASSERTED IN THIS CASE. THE CIRCUIT COURTS' DECISIONS ARE CONSISTENT WITH APPLICABLE UNITED STATES SUPREME COURT DECISIONS.

Petitioners contend that the circuit courts differ on whether persons who are citizens and voters have standing to sue a public official who has policy-making authority when the official uses public resources which are necessary to communicate his policy to his constituents. This assertion is incorrect.

The standard for determining standing is set forth in *Meese v. Keene*, 481 U.S. 465 (1987), in which the Supreme Court held:

> In determining whether a litigant has standing to challenge governmental action as a violation of the First Amendment, we have required that the litigant demonstrate 'a claim of specific present objective harm or a threat of specific future harm.' *Laird v. Tatum*, 408 U.S. 1, 14, 92 S. Ct. 2318, 2326, 33 L. Ed. 2d 154 (1972). In *Laird*, the plaintiffs alleged that the intelligence-gathering operations of the United States 'chilled' the exercise of their First Amendment rights because they feared the defendants might, in the future, make unlawful use of the data gathered. We found that plaintiffs lacked standing; the Army's intelligence-gathering system did not threaten any cognizable interest of the plaintiffs. While the governmental action need not have a direct effect on the exercise of First Amendment rights, we

> held, it must have caused or must threaten to cause a direct injury to the plaintiffs. *Id.* at 12-13, 92 S. Ct. at 2325. The injury must be "'distinct and palpable.'" *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 556 (1984). (Citations omitted).

Id. at 472.

A. Petitioners Have Not Suffered a Cognizable Injury.

It is well-settled that speech by elected officials does not injure citizens or voters who may oppose the government's position. As noted by this Court:

> Government officials are expected as a part of the democratic process to represent and espouse the views of a majority of their constituents. With countless advocates outside the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller v. State Bar of California, 110 S. Ct. 2228, 2235 (1990).

The Third Circuit reached the same conclusion. *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989). In *Frame*, a citizen argued that the federal government could not collect an assessment from him to support a position with which he disagreed. The Third Circuit

disagreed, noting that the government may be permitted to compel the payment of taxes and to spend money to support controversial speech because the government is elected by the People. Citizens in a representative government elect individuals who will, and must, speak on behalf of the entire population, including those who disagree with all or some of the government's statements. *Id.* at 1131. *See also NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

Petitioners argue that citizens deserve special protection from speech by elected officials in the context of an election on an initiative measure. This Court and circuit courts have rejected the notion that the speech of some elements of our society during the course of an initiative election may be restricted to enhance the relative voice of others. *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988). To the contrary, elected officials are expected to participate in debates involving public issues. *Keller v. State Bar of California*, *supra*; *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986).

B. The Circuit Courts have Uniformly Concluded that the Use of Public Funds to Support the Speech or Activities of Public Officials Does Not Cause Harm to the Free Speech Rights of Citizens or Voters Who Disagree with Such Speech or Activities.

All the circuit courts which have analyzed the issue of linkage between alleged injuries to the First Amendment rights of citizens and voters, and speech by elected officials which is supported by government funds have employed the "fairly traceable" test. In each instance, the court could not discern any linkage between the speech rights of the disaffected citizens and the expenditure of public resources.

In *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), supporters of Edward Kennedy challenged actions taken by the

incumbent, President Carter, and his aides. They charged that members of the Carter administration illegally expended federal funds to promote Carter's renomination. They argued that the use of public funds by the President's subordinates for salaries, travel expenses and other political outlays related to the 1980 election violated their rights to free expression and free association, infringed upon the effectiveness of their contributions, and deprived them of an equal voice in the nomination process.

The court found that the plaintiffs lacked standing to assert this claim. It could not find "either an irresistible or a legally sufficient connection" between the actions that plaintiffs alleged the federal defendants had taken and the injury that the plaintiffs allegedly suffered. *Id.* at 138. The court concluded:

> The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, cause, and conventions forecloses any reliable conclusion that voter support of a candidate is "fairly traceable" to any particular event. In the case before us, whether an appellant is viewed in the character of a voter, contributor, a noncontributing supporter, or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to appellees. Courts are powerless to confer standing when the causal link is too tenuous.

Id. at 139. *See also District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988).

The Seventh Circuit reached the same conclusion. *Shakman v. Dunne*, 829 F.2d 1387 (7th Cir. 1987). In *Shakman*, voters and candidates claimed that the Cook County, Illinois, patronage system had the purpose and effect of giving the incumbents a significant

advantage in communicating with the electorate, thereby violating their rights of speech and association. The Seventh Circuit denied standing, concluding that the link between patronage and First Amendment rights is particularly attenuated. Even though the officials admitted that one of the purposes of the patronage policy was to help elect candidates, the court found it was only one of many factors which may affect a person's decision on how to cast his ballot. The court held that a person cannot assert injury to his viability as a candidate on the basis of the advantage of incumbency. *Id.* at 1398. *See also Block v. Meese*, *supra* (the guarantee of the right of speech does not prevent the government from adding its voice to debate).

C. The Petitioners do not Dispute that the Tenth Circuit Applied the Proper Test to Determine the Libertarian Party and the Colorado Taxpayers Union did not have Standing.

The Tenth Circuit denied standing to the Libertarian Party based upon a determination that the Libertarian Party and the Colorado Taxpayers Union did not suffer a distinct and concrete injury as required in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The petitioners do not argue that the *Havens* test is inappropriate. Instead, they argue that the test was improperly applied to the facts of this case. This Court has consistently held that it will not review cases which turn solely upon an analysis of a unique fact situation in the absence of a significant legal controversy. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

As noted, this case does not present an important, unsettled legal controversy. This Court already has held that expenditures of public funds by policy-making officials does not interfere with the First Amendment rights of those persons who disagree with the speech. *Keller v. State Bar of California*, *supra*. *See also First*

National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

II. THIS CASE DOES NOT OFFER A PROPER PLATFORM UPON WHICH THE COURT MAY RESOLVE THE CONFLICT AMONG CIRCUIT COURTS REGARDING WHETHER TAXPAYERS MUST ALLEGE THAT THEY HAVE SUFFERED A MONETARY LOSS IN ORDER TO ACHIEVE STANDING IN FEDERAL COURT.

The Tenth Circuit thoroughly analyzed the major cases involving federal court challenges by state taxpayers to expenditures made by state officials. The Tenth Circuit correctly noted that there is a conflict among the circuits over whether a taxpayer must show a monetary loss in order to achieve standing in federal courts. However, this issue should not be resolved in this case.

The Ninth Circuit has established a test under which the taxpayer must satisfy the following three requirements in cases other than Establishment Clause actions in order to achieve standing: (1) taxpayer status; (2) the appropriation of moneys from the states' general funds; and (3) the spending of those funds for allegedly unlawful purposes. The taxpayer need not demonstrate that his tax burden is increased as a result of the allegedly unlawful expenditure. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984). Similarly, the Eighth Circuit has concluded that a taxpayer need not show an adverse effect on his tax burden. *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989). Both the Sixth and the Tenth Circuits require the taxpayer to show that he will be out of pocket because of the allegedly illegal appropriation. *Taub v. Kentucky*, 842 F.2d 912 (6th Cir. 1988); *Colorado Taxpayer Union v. Romer*, 963 F.2d 1394, 1401 (10th Cir. 1992).

This Court should not address the conflict because the petitioners have not met other elements of taxpayer standing over

which there is no disagreement among the circuits. Both *Hoohuli* and *Minnesota Federation of Teachers* require taxpayers to show a measurable appropriation or disbursement of funds occasioned solely by the allegedly illegal activities. *Minnesota Federation of Teachers*, 891 F.2d at 1357; *Hoohuli*, 741 F.2d at 1178. In both cases measurable funds were appropriated or disbursed solely for the purpose of supporting programs established by the respective legislative branches.

The petitioners have not alleged that money was appropriated from the states general funds for the purpose of combating initiatives. Instead, the money was appropriated for the general functions of the Office of the Governor. Moreover, the petitioners have not alleged or shown that the appropriations or disbursements are measurable. They have shown only that the Governor spent time opposing the amendment and used state resources which are typically available to him to enhance his speech.

Finally, the expenditure of money or resources incidental to the speech activities of a governor is not illegal. As the district judge noted:

> While government funds are involved, these expenditures are incidental. They enhance and extend the reach of the political person; increasing his opportunity to perform his official duties and to communicate with people. These traditional perquisites are merely enlargements of the political personage which are not separable from the man in office.

Colorado Taxpayers Union, Inc. v. Romer, 750 F. Supp. 1041, 1045 (D. Colo. 1990).

III. THE TENTH CIRCUIT DID NOT DECIDE WHETHER THE GOVERNOR VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS.

Petitioners ask this Court to determine whether the Governor's actions violated their right to petition. This request is premature. The Tenth Circuit did not reach this issue because it dismissed the appeal. Therefore, it would be inappropriate for this Court to determine the substantive issues.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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